Supreme Court, U.S.
FILED

No. 04-1612 MAY 31 2005

IN THE

Supreme Court of the United States

NEW YORK COASTAL PARTNERSHIP, INC., MAURICE BARBASH, JOHN W. LUND, SANDY ASSOCIATES, EUGENE D. FALK, DAVID ASH, JEROME LEVY, M.D., WELLS NEWELL, JOYCE SEGAL, THE HARBOUR CLUB, MODICA ASSOCIATES OF NEW YORK 122, LLC, FIRE ISLAND FERRIES, INC., JMA INDUSTRIES, INC., DAVID A. SLOANE, HARRY PARITSKY, WHITE CAP FISH COMPANY, INC., LEONARD WEINSTEIN, RICHARD STAFFORD, PAMELA JOHNSON, SAYVILLE FERRIES SERVICE, INC., DAVIS PARK FERRY CO., INC., ROBERT JOHNSON, DUNEWOOD PROPERTY OWNERS' ASSOCIATION, FAIR HARBOR FIRE DISTRICT, and JAMES GROVER, JR.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, GALE NORTON, SECRETARY OF INTERIOR, MICHAEL T. REYNOLDS, SUPERINTENDENT OF THE FIRE ISLAND NATIONAL SEASHORE, UNITED STATES ARMY CORPS OF ENGINEERS, FRANCIS J. HARVEY, SECRETARY OF THE ARMY, CARL A. STROCK, CHIEF OF ENGINEERS, U.S. ARMY CORPS OF ENGINEERS, RANDY L. DANIELS, SECRETARY, NEW YORK STATE DEPARTMENT OF STATE, and DENISE M. SHEEHAN, ACTING COMMISSIONER, STATE OF NEW YORK, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals For the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The following questions are presented for the Court's review:

1. In an APA suit to compel an agency to take specific actions directed by Congress, does the Article III standing of a plaintiff whose interests the measure was designed to protect, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 nn. 7 & 8 (1992), depend on his showing that performance of the congressionally-mandated *process* will "likely" achieve his preferred outcome?
2. Are federal courts categorically precluded from awarding declaratory and injunctive relief under the Takings Clause?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The following Petitioners are nongovernmental corporations. None has a corporate parent, nor does any publicly held company own 10% or more of any of these corporations' stock.

New York Coastal Partnership, Inc.
Modica Associates of New York 122, LLC
Fire Island Ferries, Inc.
JMA Industries, Inc.
White Cap Fish Company, Inc.
Sayville Ferries Service, Inc.
Davis Park Ferry Co., Inc.

TABLE OF CONTENTS

QUESTIONS PRESENTED ..... (I)

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

A. Factual Background 3

B. Proceedings Below 9

REASONS FOR GRANTING THE PETITION 12

I. This Court Should Grant Review to Clarify The Nature of The Redressability Requirement In Cases Where A Concretely-Affected Party Sues To Compel Performance of An Agency Process Intended For His Benefit 14

A. The Second Circuit Adopted A Redressability Requirement Foreclosed By the Decisions of this Court and In Conflict With The Decisions of The Other Courts of Appeals 15

B. The Lower Federal Courts Are Divided As To The Proper Analysis Under *Lujan* 21

C. The Second Circuit's Decision Warrants Review As A Departure From the Accepted and Usual Course of Judicial Proceedings 24

II. The Court Should Clarify That District Courts Are Not Categorically Barred From Entertaining Suits For Declaratory or Injunctive Relief Under The Takings Clause 26

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) ... 17

In re American Rivers & Idaho Rivers United, 372 F.3d 413 (D.C. Cir. 2004) 15

Applegate v. United States, 25 F.3d 1579 (Fed. Cir. 1994) 27

Babbitt v. Youpee, 519 U.S. 234 (1997) 27

Bennett v. Spear, 520 U.S. 154 (1997) 16, 17, 18, 20

In re Bluewater Network, 234 F.3d 1305 (D.C. Cir. 2000) 14, 25

Cantrell v. City of Long Beach, 241 F.3d 674 (9th Cir. 2001) 19

Catron County Bd. of Commrs. v. U.S. Fish & Wildlife Serv., 75 F.3d 1429 (10th Cir.1996) 14

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 15, 17

Colorado v. Interior Dep't, 880 F.2d 481 (D.C. Cir. 1989) 20

Committee to Save the Rio Hondo v. Lucero, 102 F.3d 445 (10th Cir.1996) 20, 21, 22, 24

Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602 (1993) 27

Connolly v. PBGC, 475 U.S. 211 (1986) 27

DeVito v. United States, 12 F. Supp. 2d 269 (E.D.N.Y. 1998) 29

Douglas County, v. Babbitt, 48 F.3d 1495 (9th Cir. 1995) 21

Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. 59 (1978) 28

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 14, 27, 28

Federal Election Comm'n v. Akins, 524 U.S. 11 (1998) 17, 23, 24

First English Lutheran Evangelical Church v. Los Angeles, 482 U.S. 304 (1987) 29, 30

Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658 (D.C. Cir.1996) (en banc) 22

Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999) 14, 22

Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc., 528 U.S. 167 (2000) 24

Heartwood, Inc. v. U.S. Forest Serv., 230 F.3d 947 (7th Cir. 2000) 23

Sierra Club v Marsh, 872 F2d 497 (1st Cir 1989) 23

Heckler v. Chaney, 470 U.S. 821 (1985) 10

Hercules v. EPA, 938 F.2d 276 (D.C. Cir. 1991) 20

Hodel v. Irving, 481 U.S. 704 (1987) 27

ICC v. New York, N.H. & H.R. Co.,
287 U.S. 178 (1932) 25

Kansas Natural Resource Council, Inc. v. Whitman,
255 F. Supp. 2d 1208 (D. Kan. 2003) 14

Lingle v. Chevron U.S.A., Inc.,
2005 WL 1200710 (2005) 27

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) .. *passim*

Lujan v. Nat'l Wildlife Found., 497 U.S. 871 (1990) 16

Marathon Oil Co. v. Lujan,
937 F.2d 498 (10th Cir. 1991) 20

Maryland Casualty Co. v. Pacific Coal & Oil Co.,
312 U.S. 270 (1941) 28

Missouri Pac. Ry. Co. v. Nebraska,
164 U.S. 403, 416 (1896) 30

Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) .. 24

National Credit Union Admin. v. First Nat'l
Bank & Trust Co., 522 U.S. 479 (1998) 18

Natural Resources Defense Council, Inc. v. EPA,
797 F. Supp. 194 (E.D.N.Y. 1992) 14

Neder v. United States 527 U.S. 1 (1999) 24

Neighbors of Cuddy Mountain v. Alexander,
303 F.3d 1059 (9th Cir. 2002) 15

Norton v. Southern Utah Wilderness Alliance,
124 S. Ct. 2373 (2004) 12, 25, 26

North Shore Gas Co. v. EPA,
930 F.2d 1239 (7th Cir. 1991) 24

Northwest Mining Ass'n v. Babbitt,
5 F. Supp. 2d 9 (D.D C. 1998) 15

Oregon Natural Desert Ass'n v. Dombeck,
172 F.3d 1092 (9th Cir. 1998) 21

Preseault v. ICC, 494 U.S. 1 (1990) 12, 27

Pye v. United States, 269 F.3d 459 (4th Cir. 2001) ... 21, 24

Regional Rail Reorganization Act Cases,
419 U.S. 102 (1974) 30

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989) 16, 17, 19

Rosebud Sioux Tribe v. McDivitt,
286 F.3d 1031 (8th Cir. 2002) 18

Ruckelshaus v. Monsanto, 467 U.S. 986 (1984) 30

Sierra Club v. Glickman,
156 F.3d 606 (5th Cir. 1998) 14, 18, 19, 21, 22

SEC v. Chenery Corp., 318 U.S. 80 (1943) 17

Society Hill Towers Owners' Ass'n v. Rendell,
210 F.3d 168 (3d Cir. 2000) 18, 22

Southern Cal. Fin. Corp. v. United States,
634 F.2d 521 (Ct. Cl. 1980) 29

In re United Mine Workers,
190 F.3d 545 (D.C. Cir. 1999) 19

United States v. Causby, 328 U.S. 256 (1946) 27

United States v. Dickinson, 331 U.S. 745 (1947) 26

United States ex rel. Dunlap v. Black,
128 U.S. 40 (1888) 25

United States v. Richardson, 418 U.S. 166 (1974) 18

Walters v. Nat'l Ass'n of Radiation Survivors,
473 U.S. 305 (1985) 23

Washington Legal Found. v. Texas Equal Access to Justice Found., 270 F.3d 180 (5th Cir. 2001) 27

State of Wis. v. FERC, 192 F.3d 642 (7th Cir. 1999) 22

STATUTES

Pub. L. 86-645 5

Pub. L. 96-585 ("Fire Island Wilderness Act") 4

Pub. L. 106-53 (Water Resources
Development Act of 1999) ..... *passim*

5 U.S.C. § 706(1) 11

Fire Island National Seashore Act, Pub. L. 88-587

16 U.S.C. § 459e 3

16 U.S.C. § 459e(a) 4
16 U.S.C. § 459e-1(e) 14, 29

16 U.S.C. § 459e-6(a) 3
16 U.S.C. § 459e-7(a) 1, 5

16 U.S.C. § 1132 4

28 U.S.C. § 2201 27

33 U.S.C. § 702c 28

Fed. R. Civ. P. 57 28

OTHER AUTHORITIES

Burt, *Procedural Injury Standing After
Lujan v. Defenders of Wildlife*,
62 U. CHI. L. REV. 275 (1995) 25

Gatchel, *Informational and Procedural Standing after Lujan v. Defenders of Wildlife*, 11 J. LAND USE & ENVTL. L. 75 (1995) 23

Zaller, *The Case for Strict Construction of Mandatory Agency Deadlines under Section 706(1)*, 42 WM. & MARY L. REV. 1545 (2001) 25

OPINIONS BELOW

The decision of the Second Circuit, reported at 341 F.3d 112 (2d Cir. 2003), is reprinted in the Appendix at 1a. The district court opinion is unreported and is reprinted at 10a. The order denying rehearing and rehearing en banc may be found at 23a.

JURISDICTION

The Court of Appeals entered its judgment denying rehearing on January 14, 2005. Justice Ginsburg entered an order extending the time to file to May 31, 2005. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 342 of Pub. L. 106-53, the Water Resources Development Act of 1999 ("WRDA 99"), states:

> The project for a combined beach erosion control and hurricane protection, Fire Island Inlet to Montauk Point, Long Island, New York * * * is further modified to direct the Secretary, in coordination with the heads of other Federal departments and agencies, to complete all procedures and reviews expeditiously and to adopt and submit to Congress, not later than 120 days after the date of enactment of this Act, a mutually acceptable shore erosion plan for the Fire Island Inlet to Moriches Inlet reach of the project.

In relevant part, 16 U.S.C. § 459e-1(e) states:

> The Secretary shall not acquire any privately owned improved property or interests therein within the boundaries of the seashore * * * except beach or waters and adjoining land * * * which the Secretary determines are needed for public access to the beach, without the consent of the owners.

Relevant portions of the other constitutional and statutory provisions involved are reproduced in the Appendix, beginning at 24a.

STATEMENT

This case concerns the fate of Fire Island, the narrow, 32-mile barrier island off the south shore of Long Island, New York, the protection and conservation of which Congress has entrusted to the Department of the Interior (DOI) and the Army Corps of Engineers (Corps), *see* 16 U.S.C. § 459e-7(a).

In affirming dismissal of this suit brought by Petitioners, Fire Island property owners, individuals who visit the Island for educational and recreational purposes, and residents of low-lying Long Island areas who depend on Fire Island for protection against flooding, to compel Respondents to take perform specific congressionally-prescribed steps to address Fire Island's shore erosion cris, the Second Circuit committed two important legal errors that warrant this Court's review.

First, it held that federal courts are without Article III jurisdiction over actions seeking to compel agencies to perform congressionally-mandated processes, *see* 5 U.S.C. § 706(1), brought by a party whose concrete interests the statute was intended to protect, unless the plaintiffs can further show that compliance with the law will "likely" result in an ultimate benefit to them. That conclusion is contrary to this Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) ("*Lujan*"), and to those of numerous Courts of Appeals, which have upheld standing (and compelled agency action) in cases where the Second Circuit's requirement could not be satisfied. Review is additionally warranted, because the error led the court to refuse jurisdiction in circumstances in which the necessity of judicial intervention has long historically recognized and had the effect of rewarding long-running, blatant agency defiance of a congressional judgment that immediate safety-protection measures were required.

The Second Circuit's decision also raises an important, inconsistently addressed question concerning the Takings Clause: whether, as broad statements in opinions of this Court have been taken to indicate, federal district courts are without

power to entertain claims for declaratory and injunctive relief based upon the Clause, or whether, consistently with the *holdings* in other of the Court's cases, a different, less categorical principle governs?

A. Factual Background

1. *The Fire Island Barrier.* Fire Island is located approximately 50 miles east of New York City, bounded by the Moriches Inlet to the east, the Atlantic Ocean to the south, and the Great South Bay and Moriches Bay to the north. (JA A44).

Approximately 80 percent of Fire Island's area is park land, and all its ocean beaches are open to the public. The largest park on Fire Island is the Fire Island National Seashore (the "Seashore" or "FINS"), which extends from the eastern boundary of Robert Moses State Park to Moriches Inlet. Fire Island's 17 residential communities and all the other Fire Island parks are maintained as private or municipal facilities within the boundaries of the Seashore.

Fire Island's communities, located in a twelve-mile section of the Island, comprise approximately 3,850 residences and businesses that are used and patronized primarily in summer. Though Fire Island is only home to some 400 year-round residents, its summer weekend population can reach 25,000, and visitors to the parks and communities number in the millions annually. (JA44-45).

2. *National Seashore Legislation.* Fire Island remained substantially undeveloped until bridges connected it to the mainland in the 1950s, whereupon the pace of development accelerated. (JA46).

a. In 1964, Congress enacted the Fire Island National Seashore Act ("FINSA"), Pub. L. 88-587, 16 U.S.C. § 459e, *et seq.*, largely in reaction to a proposal to build a road connecting the Robert Moses and Smith Point bridges. That plan was rejected, and Fire Island remains the only developed barrier island without a formal road system. (JA46). FINSA directs the Secretary of Interior to "administer and protect the Fire Island

National Seashore with the primary aim of conserving the natural resources located there," *Id.* § 459e-6(a).[1]

Citing as a model the Cape Cod National Seashore - which also contains significant private holdings - Congress expressly affirmed that the Seashore's recreational and ecological purposes were compatible with continued residential use. As members of the enacting Congress attested, establishment of the Seashore was accomplished with the strong support of Fire Island residents, many of whom made substantial grants of property, with the aim of preserving the Island's open, undeveloped character, and FINSA includes a provision, 16 U.S.C. § 459e-1(e), disabling the National Park Service from acquiring improved property without the owner's consent.

3. *Storms and Beach Erosion.* As a barrier island, Fire Island stands directly exposed to unpredictable, often violent coastal storms. The Island's beaches and sand dunes play a critical role in protecting low-lying areas on Long Island's southern shore against storm damage and flooding.

Historically, the need to replace sand lost through storms and erosion has been met in two ways: through "littoral drift," the natural process by which alongshore waves transport and deposit sand on beaches that have been depleted, and – where damage or the risk of breach has been severe – through targeted beach nourishment projects, which replenish sand (JA50).

Thus, after a March 1962 nor'easter ("the Ash Wednesday Storm") destroyed 47 houses and damaged 75 others, the Army Corps, with the cooperation of New York State, responded with

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[1]Congress's declared purpose was "conserving and preserving for the use of future generations certain relatively unspoiled and undeveloped beaches, dunes and other natural features within Suffolk County, New York which possess high values to the Nation as examples of unspoiled areas of great natural beauty in close proximity to large concentrations of urban population." 16 U.S.C. § 459e(a). In 1980, Congress enacted the Fire Island Wilderness Act, Pub. L. 96-585, designating a 1,383-acre section of the Island as the "Fire Island Wilderness Area." *See* 16 U.S.C. § 1132.

a project that replaced 1.1 million cubic yards of sand along 8.5 miles of shoreline and raised beaches to an elevation of 12 feet above mean low water. Some 9,500 feet of dune and 37,000 feet of eroded beach were quickly restored. (JA53).

FINSA confirmed the continued authority of the Army Corps to "undertake erosion control or beach protection measures in the area," 16 U.S.C. § 459e-7(a). *See also* Pub. L. 96-585(c) ("wilderness designation shall not preclude the repair of breaches that occur in the wilderness area, in order to prevent the loss of life, flooding and other severe economic and physical damage to the Great South Bay and surrounding areas").

In fact, Congress addressed Fire Island beach erosion even before FINSA's enactment, when it passed legislation authorizing the Fire Island Inlet to Montauk Point New York Combined Beach Erosion Control and Hurricane Protection Project, Pub. L. No. 86-645 - a project that, as modified and reoriented in subsequent years, looms prominent in this case.

4. *Interference With The Littoral Drift.* In great measure, Fire Island's shore erosion problems are *not* the result of "nature taking its course." For decades, federal and State authorities have engaged in activity that has seriously impaired Fire Island's primary protection against beach erosion: littoral drift. Beginning in the 1960s, they built a series of protruding stone structures, known as "groins," to the east of Fire Island, which have the effect of trapping sand that would otherwise make its way to Fire Island. This massive project was constructed and maintained in derogation of basic engineering principles, in a manner that maximized the sand deprivation and resulting storm damage suffered by Fire Island and other downdrift areas. (JA51).

This reality was recognized in the Park Service's 1978 General Management Plan for the Fire Island Seashore, which acknowledges that "[i]nterruption of [littoral] drift has played a major role in the acceleration of erosion of Fire Island's beaches," and that "Fire Island is a culturally manipulated

barrier island system, and it cannot be managed as if natural geomorphic processes had been totally unimpeded." (JA256-60).

5. The Recent Background

a. *The 1990s Storms.* Although the winters of the late 1970s and 1980s were atypically mild, the ill effects of Respondents' actions were felt with full force between 1991 and 1996, when weather returned to less serene norms, and waves pounded against a beach long deprived of its natural complement of sand. This series of storms destroyed approximately 90 properties and caused over one billion dollars in damage to FINS, State, County and Municipal properties. (JA53).

Following the storms of 1992-93, New York State requested that the Corps survey the State's Atlantic coastline and recommend actions the State (in cooperation with the Corps) could take to maintain the integrity of the Fire Island barrier and its capacity to protect the South Shore. That survey, conducted in conjunction with the State Environmental Conservation Department (NYSDEC), recommended prompt modification of the Westhampton groin field; implementation of a Breach Contingency Plan; sand bypassing at south shore inlets; and sand nourishment projects where needed, including on Fire Island. (JA54-55).

b. FIIP and the Reformulation Study. In 1994, the Corps - also at the State's request - conceived, designed and formulated the Fire Island Interim Storm Damage Protection Project (later known as "FIIP"), to serve as a "bridge" to what was expected to be a more permanent and comprehensive solution, a project referred to as the Fire Island Inlet to Montauk Point (FIMP) Reformulation Study, or the "Reformulation Study."

That Study traces its origins to the project first authorized in 1960, *see supra*. Because of the massive scale and scientific and bureaucratic complexity of the undertaking, the project has progressed at a glacial pace; review processes that were scheduled to be complete in 2004, *see* Pet.App.21a, remain unfinished, and it is widely understood that actual *construction*

of projects under the Fire Island-to-Montauk plan will occur many more years in the future. (JA54).

The declared purpose of the more narrowly-targeted FIIP was to "alleviate conditions conducive to storm damage * * * by providing temporary storm damage protection" to the Fire Island reach while the long-term Reformulation Study is being conducted, JA151-55 (DEIS).

c. *Interior Department Resistence.* The history of the FIIP has been one of the Corps's scaling back the project in order to win the assent of the Department of the Interior, followed by fresh demands and objections from that agency. Between 1995 and 1996, DOI sent the Corps hundreds of pages of "comments" critical of the project; the Corps, in an effort to secure cooperation for *some* means of adding desperately needed sand to the littoral system, acceded to almost all these demands. Thus, the project's scope was changed from a 30-year undertaking with six renourishment cycles to a six-year project with one renourishment cycle; the relationship between the FIIP and the Reformulation Study was redefined, to confirm the FIIP's interim character; and the extent and location of sand placement was altered, with sand placement and dune construction focused on developed areas and kept to a minimum in areas of major federal land holdings. (JA156).

These modifications did not prompt reciprocal concessions. On the contrary, the Interior Department's assent was always held slightly beyond reach, and the Seashore's then-Superintendent took an adversarial stance toward residents of the communities, indicating sympathy with the notion that improved properties were part of the problem; that erosion, by making the homes more vulnerable to destruction, was, for that reason, a benign force; and that erosion control measures, by "interfering" with this dynamic, were undesirable. (JA58).[2]

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[2] In 2000, the Superintendent was honored with a $2,500 cash award from a private group, in recognition of his "battle" against the Corps's shore stabilization project. *See* Pet.App.50a.

Between 1996 and 1998, the agencies received a series of letters from Petitioners' congressional representatives, expressing concern about worsening conditions on Fire Island and frustration with the agencies' failure to act, and urging that they resolve their remaining differences and move forward with the FIIP. *See, e.g.*, Pet.App.33a.

d. The 1999 Legislation and the Agencies' Defiance. In August 1999, Congress enacted, and the President signed into law § 342, "direct[ing]" the agencies to complete all necessary reviews and procedures and to adopt and submit to Congress an interim Fire-Island-specific shore erosion plan within 120 days.

Although it soon became evident that Respondents would not meet the statute's deadline, the Corps made initial efforts to discharge its responsibilities under § 342, issuing a Draft Environmental Impact Statement (EIS) for the FIIP in December 1999, scheduling public hearings for the following month, and declaring its intent to issue a NEPA Record of Decision a few months after that. In a December 17, 1999 letter to congressional leaders, the Corps sounded an optimistic note, acknowledging that "challenging issues remain[ed] unresolved," between the two federal agencies, but expressing "hope[] that a mutually acceptable solution w[ould] emerge" in the coming months. Pet.App.35a.

At the January 2000 hearing, the Draft EIS received strong endorsement from Fire Island residents and businesses in the South Shore flood zone, and the U.S. EPA rated the project as LO-1, indicating its determination that "the project will not result in significant adverse [inc]remental impacts" and that EPA did "not object to its implementation." (JA502-03). The New York DEC likewise notified the Corps that it was favorably inclined toward the project. (JA519-20).

Despite the evident willingness of the other participants to proceed - and the statutory mandate to cooperate and adopt a plan, DOI continued to resist. The agencies never completed the reviews under way in 1999. They have never adopted (nor

submitted to Congress) any "mutually acceptable shore erosion plan." Indeed, they made plain to the courts below that FIIP was not "mutually acceptable," Pet.App. 40a, 42a, and that they have decided to address Fire Island's problems exclusively in the context of the omnibus FIMP. *See, e.g.*, Pet.App.46a.

f. Emergency Conditions. While this protracted campaign of bureaucratic resistance has continued, the dangers facing Fire Island – and Long Island – have not abated. Although the Island has been spared major storms in recent years (and DOI has reversed its previous refusal to permit residents to pursue even self-financed, emergency nourishment projects in their own communities), the beaches and dunes in parts of Fire Island are so severely eroded that, in the absence of "emergency protective measures," even a "moderate storm event[]" could cause in millions of dollars in storm and flood damage to property and incalculable ecological harm (JA535-42), and the Corps's DEIS found a real possibility of a breach through Fire Island, which would have devastating consequences for the Island and the South Shore mainland alike, *see* JA155.

B. Proceedings Below

In May 2001, Petitioners filed this suit against the various authorities responsible for Fire Island's erosion crisis. Its primary thrust is that Respondents' failure take remedial and protective action violated both the specific mandates of WRDA99 and their general duties, under FINSA and other federal and State laws, to conserve and protect Fire Island. The complaint asserted that the property damage caused by the sand-pirating groin field was a "de facto taking," and, with respect to properties subject to the congressionally-conferred immunity from condemnation, an unconstitutional one.[3]

1. *The District Court Decision.* The district court dismissed

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[3]The complaint was later amended to include claims that Respondents were responsible for the loss and degradation of the habitat of a threatened bird species, the piping plover, in violation of the Endangered Species Act.

all Petitioners' claims, giving a variety of reasons why Petitioners' statutory and APA claims were not "viable,"Pet.App.17a.[4] The court also ruled that the complaint failed to state a takings claim on which relief could be granted. "Because the Fifth Amendment does not proscribe the 'taking of property' in all respects," the court reasoned, only those "'without just compensation'" - and because Petitioners had "chosen not to avail themselves" of procedures for obtaining compensation - they could not "seek injunctive relief," *Id.*13a.

The district court decision raised no question as to Petitioners' standing to sue, nor did it include any independent discussion of the APA/Section 342 claim.

2. *The Second Circuit Decision.* The court of appeals affirmed the judgment, ruling on jurisdictional grounds exclusively, *i.e.*, "on the basis that [Petitioners] do not have standing to bring this suit." Pet.App.2a. After assuming for decisional purposes that Petitioners would satisfy the injury-in-fact prong of Article III standing, *id.* n.1, the panel held that dismissal was required under the redressability prong "because [Petitioners] can only speculate whether the remedy they seek would redress their purported injuries," Pet.App.5a.

Stating that "no statutory authority * * * would specifically require [Respondents] to adopt the FIIP," the court opined (Pet.App.5a-6a) that:

> Despite [Petitioners'] optimism, there is no indication that the FIIP would, in fact, remedy Fire Island's erosion problems. Moreover, we recognize that the FIIP is merely

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[4]The court ruled: (1) that the refusal to act was "'presumed immune from judicial review' under * * * the APA," Pet.App.19a (quoting *Heckler v. Chaney*, 470 U.S. 821 (1985)); (2) that claims that FINSA had been violated were "precluded from judicial review" because that statute invests DOI with "discretion as to the best manner to" protect the shoreline (Pet.App.19a); and (3) that, because "FIIP was envisioned as only a temporary remedial measure [and] a subset of the Reformulation Study," Respondents' refusal to implement it was not "final agency action" Pet.App.21a.

> an interim plan spanning a five-year period. Accordingly, even were the FIIP successful, at best, it would be terminated and shortly replaced by another program whose chances of success are only speculative at this point in time.

The court then held Petitioners lacked standing to bring a FINSA claim, reasoning that that statute, which speaks in "general" terms and "afford[s] [Respondents] considerable discretion in exercising their authority to remedy shore erosion on Fire Island," imposes no duty "that would require [Respondents] to act in a manner that would likely redress the injury of which [Petitioners] complain." Pet.App.6a-7a.

The decision then explained that Petitioners lacked Article III standing to seek court-ordered compliance with Section 342. *See* 5 U.S.C. § 706(1). Acknowledging that the provision "contains express provisions for specific action," Pet.App.8a, the court reasoned that the "redressability" prong was not satisfied, because Petitioners could not establish that "enforcement of this provision is likely to remedy Fire Island's shore erosion problem," *id.* The decision continued:

> The Water Resources Development Act does not require the adoption of any specific plan. Nor does the act mandate that defendants-appellees adopt and submit to Congress a *successful* shore erosion plan. While the plan must be "mutually acceptable," by the act's plain language, this term means only that it must be acceptable to the Secretary of the Army and "the heads of other Federal departments and agencies." The plan need not be acceptable to plaintiffs-appellants. Thus, compliance with the Water Resources Development Act would not necessarily make it likely that any plan adopted and submitted to Congress would remedy Fire Island's shore erosion problem.

Pet.App.8a (emphasis in original).

The decision concluded by observing that its ruling did not necessarily leave Petitioners without a "remedy for their purported injuries," Pet.App.9a, citing the possibility that

property-owning Petitioners might yet be awarded "just compensation" – in the event that their property were to be destroyed (and a future judicial proceeding determined that the deprivation was a compensable Taking). At the same time, however, the court affirmed that the district court lacked jurisdiction over Petitioners' claims for equitable relief under the Takings Clause, noting that "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act," Pet.App.9a n.3 (quoting *Preseault v. ICC*, 494 U.S. 1, 11 (1990) (citations omitted)), and asserting that Petitioners had not established that "a remedy at law is, in fact, 'inadequate,'" *id.*

REASONS FOR GRANTING THE PETITION

At the heart of this suit is an effort to compel "discrete agency action that [Respondents are] required to take," *Norton v. Southern Utah Wilderness Alliance* ("*SUWA*"), 124 S. Ct. 2373, 2379 (2004), brought by parties whose concrete, particularized and legally cognizable interests are at risk of imminent injury, and whose interests Congress manifestly sought to protect when it enacted § 342.

Section 342 could not be more explicit, specific, or mandatory. It "modified" the existing legislation to make clear that Fire Island's immediate problems should not await the adoption of the permanent, omnibus FIMP, and "direct[ed]" the Respondent agencies to (1) complete all necessary reviews and procedures and (2) to agree on, adopt, and submit to Congress an interim Fire-Island-specific shore erosion plan within 120 days of its (1999) enactment.

Likewise, Respondents' default could scarcely be any more clear-cut. They did not complete the "reviews" contemplated by the statute; they did not adopt a mutually acceptable plan within 120 days, nor have they since. Their stated grounds for refusing to comply – inability to agree and a "decision" to address Fire Island's problems exclusively in the context of FIMP – are precisely what Congress ruled out.

Rather than compel the agencies to end this protracted, unlawful defiance – and take up their legal duties to provide Fire Island with urgently needed protections, the Second Circuit effectively ratified it and assured it will continue, on the ground that the asserted "redressability" defect precluded federal court jurisdiction over Petitioners' APA suit.

In addition to its practical importance to the many people who value Fire Island and depend on it for protection, this decision warrants the Court's review because the grounds for dismissal – conditioning suits to compel agencies to follow congressionally-mandated *processes* on plaintiffs' showing that performance of those procedures would "likely" afford them substantive relief – are broadly significant. Countless federal statutes mandate that agencies take actions – such as conducting environmental impact studies, consulting with other agencies, adopting plans, or promulgating regulations by a date certain – that are designed to provide protection for important affected interests, but whose effect on the ultimate outcome in any particular instance is, often by definition, uncertain.

The majority of the Courts of Appeals have correctly – but in conflict to the Second Circuit below – understood this Court's decision in *Lujan* to confirm that such suits are within their Article III jurisdiction, so long as plaintiffs show they are among the class whose concrete interests the legislatively-mandated measures were intended to protect. Although few other courts have departed as far from this understanding as did the decision below, a pattern of inconsistent decisions attests to the need for more definitive guidance than the two *Lujan* footnotes provided.

The Second Circuit's error is especially worthy of review and correction because of the context in which occurred. The court held jurisdiction unavailable under circumstances in which the law has long recognized judicial intervention to be not only appropriate, but necessary: to compel agency action that Congress determined is immediately required to safeguard public safety, property, and ecology.

The Court should also grant review to settle a question that the plurality opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), recognized to be an ongoing source of uncertainty and conflict in the lower federal courts (but one that five Justices in *Apfel* did not address): under what circumstances should a federal court entertain a suit for equitable, prospective relief under the Takings Clause? This case, in which Petitioners compellingly claim that Congress could not have intended to relegate them to post-deprivation damages, affords an opportunity for the full Court to make explicit that broad statements in its opinions should not be understood as imposing a categorical bar to awarding such relief.

I. This Court Should Grant Review to Clarify The Nature of The Redressability Requirement In Cases Where A Concretely-Affected Party Sues To Compel Performance of An Agency Process Intended For His Benefit

The feature that the Second Circuit identified as precluding federal court jurisdiction over Petitioners' APA/WRDA99 claim is, in fact, common to a wide array of important federal statutes. By definition, a plaintiff seeking to enforce a mandate that an agency promulgate regulations by a fixed date, *e.g.*, *In re Bluewater Network*, 234 F.3d 1305 (D.C. Cir. 2000) (Oil Pollution Act), cannot show that the as-yet unadopted rules will necessarily benefit him.[5] A court asked to compel the conduct of studies mandated under NEPA and other statutes requiring analysis and comparison of alternatives, *see, e.g., Catron County Bd. of Commrs. v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1433 (10th Cir.1996); or consultations required by the ESA, *Sierra Club v. Glickman*, 156 F.3d 606 (5th Cir. 1998), cannot determine that performing those steps will in fact alter outcomes

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[5]*See also, e.g., Forest Guardians v. Babbitt*, 174 F.3d 1178, 1192-93 (10th Cir. 1999) (Endangered Species Act); *Kansas Natural Resource Council, Inc. v. Whitman*, 255 F.Supp.2d 1208, 1217 (D. Kan. 2003) (Clean Water Act); *Natural Resources Defense Council, Inc. v. EPA.*, 797 F. Supp. 194 (E.D.N.Y. 1992) (Clean Air Act).

in ways that avert harm to individuals whose interests those statutes are intended to protect.[6]

The Second Circuit's redressability requirement would defeat standing in almost all such cases, contravening settled principles of administrative law, and effectively nullifying congressional determinations (1) that the mandated procedures provide necessary and real protection for important interests, and (2) that whether or not to perform them was *not* a decision to be left to agency discretion.

The Court should make explicit what the majority of Circuit Courts have understood *Lujan* to have recognized: that proof of likely, ultimate substantive relief is not a part of plaintiffs' burden to establish Article III standing in such cases.

A. The Second Circuit Adopted A Redressability Requirement Foreclosed By the Decisions of this Court and In Conflict With The Decisions of Other Courts of Appeals

Lujan considered when suits seeking to require agency performance of congressionally-mandated processes are within federal courts' Article III jurisdiction. The Court held that plaintiffs in that case, who were found not to have shown a concrete, personal stake in the performance of the ESA consultation requirements they sought to compel, lacked standing, rejecting arguments that the statutory violation could "by itself" satisfy the injury-in-fact requirement – *i.e.*, "without any showing that the procedural violation endangers a concrete interest of the plaintiff." 504 U.S. at 573 n.8.[7]

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[6] *E.g.*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (agency findings under Section 4(f) of the Department of Transportation Act); *In re American Rivers & Idaho Rivers United*, 372 F.3d 413, 420 (D.C. Cir. 2004) (FERC determinations in licensing hydropower dam); *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1062 (9th Cir. 2002) (review of timber sale under National Forest Management Act); *N. W. Mining Ass'n v. Babbitt*, 5 F. Supp. 2d 9, 14-15 (D.D C. 1998) (analysis of impacts of small businesses under Regulatory Flexibility Act).

[7] Significantly, *Lujan* which came to the Court on a summary judgment

In two lengthy footnotes, the Court explained the limits of this holding, indicating that Article III *would not* preclude a similar suit (1) if brought by a party with a legally cognizable injury (2) to compel agency performance of a process "[]connected to [her] own concrete harm," 504 U.S. at 573 n.8, explaining:

> There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Id. at 572 n.7.

In cases brought by a party with a personal interest, *Lujan* explained, agency obligations could "assuredly" be enforced, "*so long as the procedures in question are designed to protect some threatened concrete interest of [plaintiff's] that is the ultimate basis of his standing.*" *Id.* at 573 n.8 (emphasis supplied). Thus, the Court described the presence of Article III standing in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), as essentially self-evident, because "plaintiff was a citizens' council for the area in which the challenged action was to occur, so that its members would obviously be

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record, emphasized that a court deciding standing on a motion to dismiss must "'presum[e] that general allegations [of the complaint] embrace those specific facts that are necessary to support the claim,'" 504 U.S. at 561 (quoting *Lujan v. Nat'l Wildlife Found.*, 497 U.S. 871, 889 (1990)); *accord Bennett v. Spear*, 520 U.S. 154, 168 (1997). The Second Circuit's decision did not acknowledge this rule.

concretely affected," 504 U.S. at 573 n.8 – even though the provision the plaintiff sought to enforce "does not mandate particular results, but simply prescribes the necessary process," *Methow Valley Citizens Council*, 490 U.S. at 350-51.

Federal Election Comm'n v. Akins, 524 U.S. 11 (1998), gave further reasons why redressability is not defeated by the possibility (or even probability) that a plaintiff seeking review of agency action may not ultimately obtain substantive relief. Rejecting the FEC's argument that its lawful power to withhold the information the denial of which supplied plaintiffs' injury-in-fact, was fatal to Article III jurisdiction, the Court explained:

> Those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground. See, *e.g.*, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) (discussing presumption of reviewability of agency action); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case – even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). Thus respondents' "injury in fact" is "fairly traceable" to the FEC's decision not to issue its complaint, even though the FEC might reach the same result exercising its discretionary powers lawfully. For similar reasons, the courts in this case can "redress" respondents' "injury in fact."

Id. at 525; *accord Bennett*, 520 U.S. at 174 ("It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decision making").

These principles establish the Second Circuit's fundamental error in this case. Petitioners – who include individuals who own homes on Fire Island, who regularly visit its beaches and

perform scientific research there, and who depend on Fire Island for protection from storms and flooding (JA23-39) – obviously have a concrete and particularized interest, "(apart from [an] interest in having the procedure observed)," 504 U.S. at 573 n.8. Far from seeking to enforce statutory requirements toward which they stand in the same position as the public as a whole, *United States v. Richardson*, 418 U.S. 166 (1974), Petitioners are in the relatively small subset of the public who have any interest in the subject of Fire Island shore erosion. *See Society Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 176 (3d Cir. 2000) ("If the Residents do not have standing to protect the historic and environmental quality of their neighborhood, it is hard to imagine that anyone would have standing").

Nor can there be any question that the steps set forth in Section 342 were "designed to protect * * * [the] threatened concrete interest * * * that is the ultimate basis of [Petitioners'] standing," *Lujan*, 504 U.S. at 573 n.8; *see Glickman*, 156 F.3d at 613 n.4 (finding standing, after determining "that the procedures in question were designed to protect [environmental group's] threatened concrete interest in this case"). It takes no inferential leap to recognize that individuals whose property, recreational, scientific and ecological interests are seriously threatened by Fire Island shore erosion stand to be protected by adoption of a "shore erosion plan" for Fire Island; indeed, the interests of Petitioners, whose representatives in Congress championed § 342 (at the behest of Petitioners and their neighbors) stand closer to the core of that provision's concern, *Bennett*, 520 U.S. at 166, 177, than the "adjacent landowner" NEPA plaintiffs whose standing *Lujan* unreservedly endorsed. *Cf. Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998) (APA standing not limited to those whom provision was *"specifically intended to benefit"*) (emphasis added).[8]

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[8]*Cf. Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031 (8th Cir. 2002) (under *Lujan*, plaintiff "must still show that its concrete interests, which underlie the procedural right, fall within the zone of interests the statutes are

The Second Circuit's rule, that "redressability" *further required* Petitioners to show that the agencies' performing measures enacted to protect their interests would "likely" result in a "successful" shore erosion plan – or one "acceptable" *to Petitioners, see* 8a – is directly contrary to the principles affirmed in *Lujan*. The Court there expressly recognized that a plaintiff has standing to compel an agency to perform a mandated process "even though he cannot establish *with any certainty*" that the measure will result in his ultimately being spared injury, 504 U.S. at 572 n.7.

As other courts have recognized, few, if any, procedural obligation cases could go forward if the plaintiffs' standing depended on showing that the outcome will "likely" be a "success," in the ultimate sense contemplated by the Second Circuit's decision. Environmental interests are often harmed after compliance with NEPA, *see Methow Valley Citizens Council*; *Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001) (redressability does not require birdwatcher plaintiffs to "show that the revised EIS would result" in adoption of the most environmentally sound alternative). Consultations mandated under the ESA do not always yield concrete results, *see Glickman*, 156 F.3d at 615 & n.5; *Lujan*, 504 U.S. at 572 n.7 (noting nonreliance on Government's argument that redressability was lacking because "*even if* the other agencies were obliged to consult with the Secretary, they might not have followed his advice") (emphasis in original). Mineworkers seeking to compel promulgation of safety regulations, *see, e.g.*, *In re United Mine Workers*, 190 F.3d 545 (D.C. Cir. 1999), cannot readily show that the regulations the agency *would have issued* would have been effective.

Nor do this Court's decisions support the suggestion that Petitioners' standing should depend on a showing that the plan the agencies would adopt (if they complied with the law) would

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designed to protect").

be "acceptable" to Petitioners. As a legal matter, whatever discretion Respondents retain to adopt a plan that is not "acceptable" to every Fire Island stakeholder does not include authority to adopt no plan at all: "Administrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform." *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 500 (10th Cir. 1991). And common sense says that individuals whose interests are imminently threatened by shore erosion will find *any* agency-endorsed emergency plan more "acceptable" than none at all. *See also Bennett*, 520 U.S. at 168 (upholding standing of individual water user based on allegation of reduction in amount of water available overall).[9]

Courts have recognized the serious unfairness of allowing an agency to exploit uncertainty about the content or efficacy about what it "would have done" to defeat a suit seeking to bring unlawful nonfeasance to an end. *See Committee to Save the Rio Hondo v. Lucero,* 102 F.3d 445, 448 (10th Cir.1996) (plaintiff should not be required to *produce* an EIS to have standing to compel an agency to perform one); *cf. Hercules v. EPA*, 938 F.2d 276, 281 (D.C. Cir. 1991) (agency's actions as of statutory deadline are "deemed the agency's 'complete response'" to statutory requirements'") (quoting *Colorado v. Dep't of Interior*, 880 F.2d 481, 485 (D.C. Cir. 1989)).[10]

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[9]As a matter of practical reality, Congress did not impose the § 342 plan adoption duty in the abstract. It did so in the context of a FIIP proposal that had been developed over the course of years and subjected to substantial review. By requiring the agencies to "complete all reviews" and giving them 120 days to "adopt a plan," Congress, which was surely aware of how long "reviews" can take, must fairly be understood to have intended that the adopted "plan" mandated under § 342 would bear a close resemblance to the FIIP (an approach Petitioners made clear was acceptable to them).

[10]Nor is there the least merit to the Second Circuit's suggestion that the "interim" character of the plan Congress mandated somehow detracts from Petitioners' claim, let alone their *standing* to maintain it. On the contrary, Congress's enactment of § 342 and its command that Respondents take "interim" Fire-Island action right away was a definitive rejection of the

The Second Circuit's rule cannot be reconciled with decisions of the Fourth, Fifth, Ninth, and Tenth Circuits, each of which has made clear that focus on the probability of ultimate redress is inappropriate in determining standing in cases such as this one. The Tenth Circuit, for example, has recognized that it is "immaterial" to the standing of a plaintiff suing to compel compliance with a legally mandated processes, that performance of the procedure "[might] not change" the outcome for plaintiffs. *Rio Hondo Committee*, 102 F.3d at 448; *accord Douglas County, v. Babbitt*, 48 F.3d 1495, 1500 (9th Cir. 1995) (observing that uncertainty as to whether the findings of an EIS would affect the agency's determination is "not important" under *Lujan*); *Glickman*, 156 F.3d at 613 (a "plaintiff need not show that the procedural remedy that he is requesting will in fact redress his injury"); *Pye v. United States*, 269 F.3d 459, 467-68 & n.7 (4th Cir. 2001) ("we may redress [plaintiffs'] injury by requiring the Corps to comply with the procedures required by the National Historic Preservation Act"; "plaintiffs need not show that the result of the agency's deliberations will be different if the statutory procedure is followed").[11]

B. The Lower Federal Courts Are Divided As To The Proper Analysis Under *Lujan*

Although the majority of courts have understood *Lujan* as affirming that redressability is not defeated by uncertainty as to

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agencies' "no immediate action-is-needed" approach (and a victory for Petitioners and others on Fire Island, who spent years calling congressional attention to the seriousness of the shore problem, the recalcitrance of the Respondents; and the likelihood that "permanent" relief would be too late in coming). When the legislature is persuaded that a threat is sufficiently imminent, *see Lujan*, 504 U.S. at 564, to direct an agency to act immediately, the "temporary" duration of the mandated emergency measures cannot weigh *against* judicial power to enforce them.

[11] *See also Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1094 (9th Cir. 1998) ("To establish redressability, * * * the plaintiffs need not demonstrate that the ultimate outcome following proper procedures will benefit them"). *Cf. State of Wis. v. FERC*, 192 F.3d 642, 646 (7th Cir. 1999).

whether agency performance of the mandated process will, in fact, result in a substantive benefit for the plaintiff, there remains considerable uncertainty as to the nature of the Article III inquiry *Lujan* contemplates.

Most decisions have understood the *Lujan* footnotes as shifting the redressability focus entirely away from the statistical probability of a plaintiff-satisfying ultimate outcome – and toward the connection between plaintiff's concrete interests and the design of the provision she seeks to enforce, *see, e.g., Rio Hondo Committee*. But other courts have assumed that probability of *substantive* redress remains "[]material" – indeed, central – to the standing inquiry, treating *Lujan* as having reduced the required level of certainty Thus, in an influential decision, an *en banc* majority of the D.C. Circuit held that:

> To demonstrate standing, then, a procedural-rights plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that *it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest.*

Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 667 (D.C. Cir.1996) (en banc) (emphasis added). *Compare Rio Hondo Committee*, 102 F.3d at 451 (expressly rejecting D.C. Circuit's standard as inconsistent with *Lujan* and with the structure and purposes of the legislation). Other decisions indicate that the probability of a change in ultimate outcome remains relevant, but that a far less onerous showing than "substantial probability" is appropriate. *Society Hill Towers*, 210 F.3d at 176 (observing that "the alleged injury *may well* be redressed" by requiring defendant to follow process) (emphasis added); *Glickman*, 156 F.3d at 613 ("the plaintiff must * * * show that there is a *possibility* that the procedural remedy will redress his injury") (emphasis added).[12]

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[12]Although *Glickman* used the language of (very weak) probability, it appeared to recognize that redressability is established "by show[ing] that 'the procedures in question are designed to protect some threatened concrete

Moreover, decisions reaching similar results betray disagreement as to the reasons *why* "normal" redressability requirements do not defeat standing in the circumstances discussed in *Lujan*. Some courts note the "informational" aspect of the agency processes, *Heartwood, Inc. v. U.S. Forest Serv.*, 230 F.3d 947, 952 & n.5 (7th Cir. 2000); *cf. Akins*, 524 U.S. at 25, holding that plaintiffs' injuries are redressed by agency compliance even if outcomes do not change; others describe their decisions as redressing a congressionally-created injury (*e.g.*, a right to be free of harm from uninformed decision-making); and others emphasize Congress's authority to determine which concrete injuries should be actionable. *Cf. Sierra Club v Marsh*, 872 F2d 497, 500 (1st Cir 1989). *See generally* Gatchel, *Informational and Procedural Standing after Lujan v. Defenders of Wildlife*, 11 J. LAND USE & ENVTL. L. 75, 99 (1995) (discussing "confusion surround[ing] the amount of relaxation of the redressability and immediacy requirements" after *Lujan*); Burt, *Procedural Injury Standing After Lujan v. Defenders of Wildlife*, 62 U. CHI. L. REV. 275 (1995).

Although Petitioners would have standing under any of these approaches (and indeed even under a proper application of the implausibly demanding Second Circuit rule, *see* n.7, *supra*), the Tenth Circuit approach is the most consistent with *Lujan* and with broader principles underlying the Court's standing and administrative law jurisprudence. First, the rule shows proper respect for Congress: a determination that the duty was designed to protect the plaintiff's concrete interest, *see Lujan*, 504 U.S. at 573 n.8, *means* that Congress has determined that the likelihood of substantive protection, whatever its magnitude, is sufficient to warrant the agency process it has legislated. *Cf. Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 334 (1985).

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interest of [its] that is the ultimate basis of [its] standing.'" 156 F.3d at 613 (quoting *Lujan*, 504 U.S. at 573 n.8); *Laub v. U.S. Dept. of Interior*, 342 F.3d 1080, 1087 (9th Cir. 2003) (standing established because environmental analysis "could influence" result).

When a plaintiff has a personal interest that is threatened, the increased *probability* of protection afforded by following the legislatively-ordained process is enough "redress" to satisfy Article III. *Cf. Lujan*, 504 U.S. at 580 (Kennedy, J. concurring) (noting congressional power to "articulate chains of causation that will give rise to a case or controversy").[13]

By contrast, a "redressability" analysis that focuses on ultimate outcomes is inconsistent with settled understandings about the availability of judicial review, *see Akins*, 524 U.S. at 25 (possibility that agency might yet "reach the same result for a [lawful] reason" does not defeat redressability).[14] It shows insufficient respect for the judgment of Congress that the benefits of the process are worthwhile; it imposes the heaviest burdens on those seeking to challenge the most blatant agency inaction (*e.g.*, by permitting the agency to accuse the challenger of "speculating" as what it would have done); it suggests nonjusticiability of the claim that *Lujan* indicated could "assuredly" be maintained – a NEPA suit by an affected landowner; and it leaves plaintiffs to litigate over (and courts to adjudicate) complex predictive judgments at the *standing* stage.

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[13]Many of the relevant cases describe both the injury and the redress in probabilistic terms. *See, e.g., Rio Hondo*, 102 F.3d at 452 (because injury entails "establish[ing] the likelihood of [] increased risk" associated with uninformed decisionmaking, redressability is accomplished by ordering compliance with measures that lower that risk); *Accord Pye*, 269 F.3d at 267 & n.8. *See also North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1242 (7th Cir. 1991) ("a probabilistic benefit from winning a suit is enough 'injury in fact' * * * to confer standing in the undemanding Article III sense").

[14]Other doctrines permitting parties to defeat liability on the ground that a violation is legally immaterial typically bear on the substantive *merits*, rather than the plaintiff's standing to sue – and often entail a defendant's carrying a heavy proof burden. *See Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Neder v. United States* 527 U.S. 1, 15 (1999) (harmless error); *cf. Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 189 (2000) (emphasizing demanding nature of showing required to establish mootness through "voluntary cessation").

C. The Second Circuit's Decision Warrants Review as a Departure From the Accepted and Usual Course of Judicial Proceedings

The Second Circuit's seriously erroneous jurisdictional ruling occurred in a circumstance where courts have long recognized not only their power to intervene, *see Lujan*, 504 U.S. at 560 (standing "serves to identify those disputes which are appropriately resolved through the judicial process"), but their responsibility to do so – when an Executive Branch official refuses to perform "precise, definite" acts "'specifically and unequivocally commanded" by the Legislature. *SUWA*, 124 S. Ct. at 2379 (quoting *ICC v. New York, N.H. & H.R. Co.*, 287 U.S. 178, 204 (1932) and *United States ex rel. Dunlap v. Black*, 128 U.S. 40, 46 (1888)). Some courts have held that where congressionally-imposed deadlines are flouted, the judicial responsibility is non-discretionary:

> If [the agency] withholds such timely action, a reviewing court must compel the action unlawfully withheld. To hold otherwise would be an affront to our tradition of legislative supremacy and constitutionally separated powers.

Forest Guardians v. Babbitt, 174 F.3d 1178, 1190 (10th Cir. 1999). *See* Zaller, *The Case for Strict Construction of Mandatory Agency Deadlines under Section 706(1)*, 42 WM. & MARY L. REV. 1545, 1549-50 (2001).

But Respondents' violation is considerably more "blatant," *Bluewater Network*, 234 F.3d at 1314, than failing to comply with § 342 in time: as explained, they have disclaimed any intention of *ever* complying with the directive and have adopted a position that is directly contrary to the one expressed by Congress. *See id.* (granting writ of mandamus, on ground that "the agency's current 'we-will-not-promulgate-regulations' position is a blatant violation of the Act").

Finally, the Second Circuit's failure to exercise jurisdiction and hold respondents to their duty must be judged in light of the subject-matter of the statute and the concerns that led to its

enactment. Section 342 is a command that the agencies act expeditiously to deal with a worsening crisis that posed (and continues to pose) a threat to human safety, property, and ecology, and it was prompted by Respondents' refusal to take appropriate action, pursuant to their existing (general) statutory duties. *See American Rivers*, 372 F.3d at 418 (judicial response to agency default must "take into account the nature and extent of the interests prejudiced," noting that "delays * * * are less tolerable when human health and welfare are at stake").[15]

II. The Court Should Clarify That District Courts Are Not Categorically Barred From Entertaining Suits For Declaratory or Injunctive Relief Under The Takings Clause

The complaint in this case alleged that defendants' construction of groins that blocked the natural littoral drift of sand along the shoreline is threatening destruction of beachfront property owned by various of the plaintiffs. These allegations, if proven, would establish a Fifth Amendment taking: a long line of authority recognizes that a taking occurs when government, with or without taking title, authorizes or causes a physical invasion of private property, as by flooding associated with a public works project. *See United States v. Dickinson*, 331 U.S.

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[15] The Second Circuit's dismissal of Petitioners' other statutory claims also reflected a fundamental misunderstanding of the Article III redressability requirement. The court below held that Petitioners lacked *standing* to raise their FINSA claim, on the ground that that statute's general terms could not readily be construed as imposing a duty to take specific actions likely to redress Petitioners' injuries. Pet.App.6a-7a. But that ruling badly confuses Petitioners' Article III standing with the merits of their APA cause of action: to determine Petitioners' standing, the Second Circuit should have looked to whether *a favorable decision – e.g.*, a declaration that Respondents' refusal to proceed was in violation of their duties under FINSA – would redress Petitioners' injuries, not whether that claim was likely to succeed on its merits. Nor was this error harmless. No unfocused effort to enforce a broad statutory mandate, *see SUWA*, Petitioners' claim targets a particular instance of agency inaction reflecting positions Congress specifically disabled the agency from adopting, *i.e.*, (1) postponing Fire Island action until the FIMP, and (2) treating erosion threats to improved property as benign.

745 (1947); *United States v. Causby*, 328 U.S. 256 (1946); *Applegate v. United States*, 25 F.3d 1579, 1580 (Fed. Cir. 1994) ("Before the [federal] Canaveral Harbor project, a natural southerly littoral flow of sand replenished 41 miles of white sandy beaches. The * * * project interrupted this littoral flow. * * * Due to the interruption of the littoral flow of sand, the landowners have lost shoreline property").

The district court nevertheless dismissed property-owning Petitioners' takings claim at the threshold, on the basis that they could seek post-deprivation remedies under the Tucker Act or state law. Pet.App.13a. The court of appeals affirmed, likewise holding that Petitioners could not pursue claims for equitable relief to protect their property from being washed away. *See* Pet.App.9a & n.3 (citing *Preseault*, 494 U.S. at 11).[16]

As the plurality in *Apfel* recognized, the question when a party may sue for prospective relief under the Takings Clause has generated continuing conflict and uncertainty. *See* 524 U.S. at 522; *see also Washington Legal Found. v. Texas Equal Access to Justice Found.*, 270 F.3d 180, 190-95 (5th Cir. 2001), *vac'd and remanded sub nom. Phillips v. Washington Legal Found.*, 538 U.S. 942 (2003). Some decisions, like the ones below, have treated broad statements in this Court's opinions as announcing a rule of near *per se* unavailability. But as the *Apfel* plurality observed, the Court's precedents do not support any such undiscriminating rule: the Court repeatedly has sustained injunctive relief in Takings cases, *id.* (citing *Babbitt v. Youpee*, 519 U.S. 234 (1997); *Hodel v. Irving*, 481 U.S. 704 (1987); *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 641-47 (1993)), and entertained on the merits many other Takings challenges brought in district court, *see, e.g., Lingle v. Chevron U.S.A., Inc.*, 2005 WL 1200710 (2005); *Connolly v. PBGC*, 475 U.S. 211 (1986).

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[16]Without elaboration, the appeals court also announced, in the final sentence of its decision, that it was not "convinced" that Petitioners' legal remedies were "inadequate." Pet.App.9a.

This case presents an opportunity for the full Court to make explicit the principle that explains these seemingly divergent results: that there is no *per se* bar, and that availability *vel non* of such relief is to be determined under ordinary rules of law and equity, in light of the particular circumstances in which the Clause is invoked and whether Congress intended to confine plaintiffs to a post-deprivation damages remedy.

Given the "nature of the taking alleged" in this case, equitable relief "was within the district court[']s power to award." *Apfel*, 524 U.S. at 521 (plurality opinion). First, the practical concerns animating the Declaratory Judgment Act, 28 U.S.C. § 2201, apply with potent force here. As this Court has recognized, the Act "'allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained.'" *Apfel*, 524 U.S. at 521 (plurality opinion) (quoting *Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 71 n. 15 (1978)).

There "is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality," *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941), as to the scope of respondents' legal (and factual) responsibility for the ongoing destruction of Petitioners' property. A determination that Respondents are legally responsible would, as a practical matter, spare all parties great damage: if Respondents' Taking Clause liability is established now, it is far more likely that they will take the steps necessary to prevent further property destruction (and the large compensation obligations it would trigger) from coming to pass.[17]

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[17]Although declaratory relief is not dependent on the inadequacy or unavailability of other remedies, *see* Fed. R. Civ. P. 57, a Tucker Act remedy would not fully compensate Petitioners for the loss of their homes, and might be resisted by defendants based upon the Flood Control Act, which provides that "[n]o liability of any kind shall attach to or rest upon the United States

Moreover, the core of Petitioners' claim is that the taking is *unauthorized* – and indeed forbidden by – Congress: not only do Petitioners maintain that Respondents' means of building and maintaining the groin field contravened congressional intent (and that their refusal to corrective measures is in violation of express congressional directives), but there is an *express statutory prohibition against nonconsensual takings of improved properties*. That prohibition, 16 U.S.C. § 459e-1(e), states (with exceptions not relevant here) that "the Secretary shall not acquire any privately owned improved property or interests therein within the boundaries of the seashore * * * without the consent of the owners." *Southern Cal. Fin. Corp. v. United States*, 634 F.2d 521, 525 n.8 (Ct. Cl. 1980) ("whenever there is no authority for a taking or intrusion, the claimant, although unable to obtain compensation, can seek an injunction or a declaratory judgment").

The general principles that support judicial nonintervention lose force when plaintiffs seek to stop takings on the basis that the government lacks the power to take at all. In the paradigm exercise of the eminent domain power, the legislature has determined (1) that the purpose is a worthy one, and (2) that those public purposes justify the action's costs (*i.e.*, compensating property owners), and injunctive relief would interfere with those determinations. But when an *un*authorized Taking is arrested, there has been no such legislative judgment with which to interfere; indeed, by preventing statutorily improper action, a court's order *vindicates* the authority of the body legally entitled to make the decision whether to condemn. *Cf. First English Lutheran Evangelical Church v. Los Angeles*, 482 U.S. 304, 305 (1987) (noting that "[o]nce a court determines that a taking has occurred, the government retains the whole range of options already available – amendment of the regulation, withdrawal of the invalidated regulation, or exercise

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for any damage from or by floods or flood waters at any place." 33 U.S.C. § 702c. *See DeVito v. United States*, 12 F. Supp. 2d 269 (E.D.N.Y. 1998).

of eminent domain").[18]

Importantly, § 459e-1(e) does not merely cast doubt on Executive authority to take, it makes emphatically clear that Congress did not intend to relegate Petitioners to the usual compensation-after-destruction remedy. On the contrary, the *meaning* of the exemption Congress enacted into FINSA (largely in recognition of landowners' generosity and support for the legislation) is that monetary compensation, whether after an otherwise regular exercise of the eminent domain power or after inverse condemnation, is an inadequate remedy.

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

[18]Accordingly, this Court's decisions emphasize the centrality of post-deprivation remedies for appropriations that are "*duly authorized for a public use*," *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1016 (1984) (emphasis added); *First English*, 482 U.S. at 315 ("the Amendment makes clear that it is designed * * * to secure compensation in the event of otherwise proper interference amounting to a taking") (emphasis omitted); *cf. Regional Rail Reorganization Act Cases*, 419 U.S. 102, 127 n.16 (1974) (indicating that "recovery is not available in the Court of Claims" for unauthorized taking). This distinction tracks another strain of Court's Takings case law: when government is alleged to run afoul of the Clause's "public use" limitation, injunctive relief is considered appropriate, even if the taking is compensated. *See, e.g., Missouri Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 416 (1896).

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MAY 2005

APPENDIX

United States Court of Appeals,
Second Circuit.

NEW YORK COASTAL PARTNERSHIP, INC., Maurice Barbash, John W. Lund, Sandy Associates, Eugene D. Falk, David Ash, Jerome Levy, M.D., Wells Newell, Joyce Segal, the Harbour Club, Modica Associates of New York 122, LLC, Fire Island Ferries, Inc., JMA Industries, Inc., David A. Sloane, Harry Paritsky, White Cap Fish Company, Inc., Leonard Weinstein, Richard Stafford, Pamela Johnson, Sayville Ferries Service, Inc., David Park Ferry Co., Robert Johnson, Dunewood Property Owners' Association, Fair Harbor Fire District & James Grover, Jr.,
Plaintiffs-Appellants,
v.
UNITED STATES DEPARTMENT OF THE INTERIOR, Gale Norton, Secretary of Interior, Constantine J. Dillon, Superintendent of the Fire Island National Seashore, United States Army Corps of Engineers, Gregory R. Dahlberg, Acting Secretary of the Army, Robert B. Flowers, Lt. Gen, Chief of Engineers, U.S. Army Corps of Engineers, Randy L. Daniels, Secretary, New York State Department of State & Erin M. Crotty, Commissioner, State of New York, Department of Environmental Conservation,
Defendants-Appellees.
Docket No. 02-6132.
Argued: April 2, 2003.
Decided: Aug. 18, 2003.

Before: NEWMAN, POOLER, KATZMANN, Circuit Judges.

POOLER, Circuit Judge.

Plaintiffs-appellants appeal from the April 22, 2002 judgment of the United States District Court for the Eastern

District of New York (Jacob Mishler, *District Judge*) granting defendants-appellees' motion to dismiss the second amended complaint. We affirm on the basis that plaintiffs-appellants do not have standing to bring this suit.

BACKGROUND

Fire Island is located off the coast of Long Island, New York. The island, which is approximately 32 miles long and between one-quarter and three-quarters of a mile wide, is home to a series of beaches, parks, houses, and tourist-related businesses. The Piping Plover, a migratory songbird species whose Atlantic Coast population is "likely to become endangered in the foreseeable future," as determined by the U.S. Fish & Wildlife Service, pursuant to 16 U.S.C. § 1532(20), uses the island's beaches for nesting. The island itself helps protect Long Island from storms and flooding from the Atlantic Ocean.

In 1964, Congress passed the Fire Island National Seashore Act ("FINSA"), *et seq.*, which places primarily responsibility for conserving and preserving the Fire Island coastline with the U.S. Department of the Interior ("the DOI") and the U.S. Department of Army, Corps of Engineers ("the Corps of Engineers"). Pursuant to the Flood Control Act of 1970, the state of New York must approve any shore erosion or beach protection measure. *See* 42 U.S.C. § 1962d-5b.

At present, the DOI and the Corps of Engineers are conducting a reformulation study to determine the best method to control shore erosion on Fire Island. As an interim protection measure, the Corps of Engineers proposed the Fire Island Interim Project ("the FIIP"), which would entail using sand to construct or enhance various dunes and beaches on the island. The Corps of Engineers estimated that the FIIP would require an initial investment of $52.8 million and annual maintenance costs of $5.2 million over a five-year period. Faced with a total estimated cost of $78.8 million, the DOI and the Corps of

Engineers decided not to proceed with the FIIP. Moreover, the state of New York did not agree to endorse the FIIP.

In May of 2001, plaintiffs-appellants filed this action against "various federal and state authorities responsible for Fire Island's erosion crisis." Some plaintiffs-appellants fear that their property on Fire Island will eventually "wash away." Plaintiffs-appellants who own property on Long Island allege that the erosion of Fire Island's beaches and sand dunes will result in damage to and eventual destruction of their property, as Fire Island "play[s] a critical role in protecting against storm damage and flooding" and "protect[s] hundreds of millions of dollars worth of property on the mainland." Plaintiffs-appellants, including the New York Coastal Partnership, Inc., also are concerned about the environmental consequences of the erosion of Fire Island's beaches, which includes the destruction of the Piping Plover's nesting habitat.

Plaintiffs-appellants allege that defendants-appellees failed to take remedial and protective actions that would remedy Fire Island's sand erosion problem. Plaintiffs-appellants also allege that defendants-appellees exacerbated the problem by preventing the replenishment of sand through "littoral drift," whereby sand from other islands would migrate down-drift to Fire Island. Plaintiffs-appellants assert that these acts and omissions constitute: 1) a de facto taking of property in violation of the Fifth and Fourteenth Amendments of the United States Constitution; 2) a deprivation of property in violation of 42 U.S.C. § 1983; 3) a violation of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*; 4) breaches of statutory and fiduciary duties arising under FINSA, the Flood Control Act, the Wilderness Act, 16 U.S.C. § 1131 *et seq.*, the National Park Service Act, 16 U.S.C. § 1 *et seq.*, the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, the Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4371 *et seq.*, the Water

Resources Development Act of 1999, Pub.L. 106-53, and the Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.;* and 5) a violation of the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* ("APA").

The United States District Court for the Eastern District of New York (Jacob Mishler, *District Judge*) granted defendants-appellees' motion to dismiss the second amended complaint on April 19, 2002. With respect to the takings claim, the district court ruled that the Takings Clause only prohibits takings "without just compensation," and the court noted that "both the federal and state judicial systems provide adequate post-deprivation remedies by which [plaintiffs-appellants] might bring an action seeking 'just compensation' for the alleged governmental taking." The district court dismissed plaintiffs-appellants' claim under 42 U.S.C. § 1983 pursuant to sovereign immunity. The district court dismissed the claim under the Endangered Species Act, holding that "[p]laintiffs have not identified any conduct, in which the Defendants have engaged, which can serve as the basis of an action under the [Act]." In particular, the district court found that plaintiffs-appellants complained largely of government inaction and pleaded only one affirmative act, which predated the Endangered Species Act and was time-barred. The district court dismissed plaintiffs-appellants' claims that defendants-appellees breached their statutory and fiduciary duties, holding that the federal defendants-appellees did not waive sovereign immunity and that none of the statutes imposed an affirmative duty upon the state defendants-appellees. Finally, the district court held that plaintiffs-appellants could not maintain their APA claim because agency inaction is presumably immune from judicial review and there was no "final agency action" in this case. Plaintiffs-appellants now appeal the district court's judgment.

DISCUSSION

Plaintiffs-appellants seek relief that would compel defendants-appellees to implement the FIIP or to take affirmative action to combat shore erosion on Fire Island. However, plaintiffs-appellants do not have standing to assert any of their claims for equitable relief, as we cannot conclude that the remedy they seek would likely redress the injuries of which they complain.

In order to have standing, a plaintiff must satisfy three constitutional requirements. First, the plaintiff must have suffered an "injury in fact," which is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (internal citations and quotation marks omitted). "Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.' " *Id.* (citation omitted) (alterations in original). Third, and most important for purposes of this appeal, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " *Id.* (citation omitted).

Plaintiffs-appellants have no standing in this case, because we can only speculate whether the remedy they seek would redress their purported injuries.[1] [FN1] Plaintiffs-appellants identify no statutory authority that would specifically require defendants-appellees to adopt the FIIP. Despite plaintiffs-appellants' optimism, there is no indication that the FIIP would, in fact, remedy Fire Island's erosion problems. Moreover, we recognize that the FIIP is merely an interim plan

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[1]For purposes of this appeal, we assume without deciding that the injuries of which plaintiffs-appellants complain are "actual" or "imminent," and not "conjectural" or "hypothetical." *Lujan,* 504 U.S. at 560.

spanning a five-year period. Accordingly, even were the FIIP successful, at best, it would be terminated and shortly replaced by another program whose chances of success are only speculative at this point in time.

Plaintiffs-appellants argue that defendants-appellees' failure to act violates the Endangered Species Act, FINSA, the National Park Service Act, the Water Resources Development Act, and 42 U.S.C. § 1983.[2] However, plaintiffs-appellants identify no duty in any of these statutes that would require defendants-appellees to act in a manner that would likely redress the injury of which they complain. Plaintiffs-appellants argue that defendants-appellees are violating the Endangered Species Act because their inaction is destroying the nesting area of the Piping Plover. Section 9 of the Endangered Species Act makes it unlawful for any person to "take" any endangered or threatened species. *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon,* 515 U.S. 687, 690 (1995). The act defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

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[2]In their second-amended complaint, plaintiffs-appellants alleged that defendants-appellees have violated a host of statutes. Before this Court, however, plaintiffs-appellants specifically argue only that defendants-appellees have violated the Endangered Species Act, FINSA, the National Park Service Act, the Water Resources Development Act, and 42 U.S.C. § 1983. While plaintiffs-appellants reference "the other individual statutes that Defendants are charged with violating," they provide no briefing specific to their initial allegations that defendants-appellees have violated the Fire Island Wilderness Act, the National Environmental Policy Act, the Environmental Quality Improvement Act of 1970, and the Coastal Zone Management Act. Plaintiffs-appellants also concede that the federal defendants-appellees are immune from liability under the Flood Control Act and provide no briefing that discusses whether the state defendants-appellees are liable under this statute. Accordingly, plaintiffs-appellants have waived these claims, *see LoSacco v. City of Middletown,* 71 F.3d 88, 92-93 (2d Cir.1995), though they have no standing to assert them for the reasons discussed in this opinion.

16 U.S.C. § 1532(19). While there is support for the notion that omissions--in the face of a duty to act--may constitute violations of the Endangered Species Act, *see Babbitt*, 515 U.S. at 716, 115 S.Ct. 2407 (Scalia, J., dissenting), plaintiffs-appellants identify no duty requiring defendants-appellees to act in a manner that would likely redress their alleged injuries.

Similarly, FINSA and the National Park Service Act impose no specific duties to act under these circumstances at this time. These statutes speak only in terms of general duties while affording the federal defendants-appellees considerable discretion in achieving the statutes' general mandates. FINSA provides that the Chief of Engineers, Department of the Army, has the authority to undertake shore erosion control of Fire Island. 16 U.S.C. § 459e-7(a). The act also provides that "[t]he Secretary [of the Interior] shall administer and protect the Fire Island National Seashore with the primary aim of conserving the natural resources located there." 16 U.S.C. § 459e-6(a). Similarly, the National Park Service Act created the National Park Service, which

> shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations ... by such means and measures as to conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. § 1. While plaintiffs-appellants interpret these statutes as imposing general duties, there is no indication that the federal defendants-appellees' exercise of discretion violates any specific requirement or prohibition, as Congress afforded them considerable discretion in exercising their authority to remedy

shore erosion on Fire Island.

Plaintiffs-appellants pin most of their hopes on the Water Resources Development Act of 1999, which required "the Secretary [of the Army], in coordination with the heads of other Federal departments and agencies, to complete all procedures and reviews expeditiously and to adopt and submit to Congress, not later than 120 days after the date of enactment of this Act, a mutually acceptable shore erosion plan for the Fire Island Inlet to [the] Moriches Inlet...." Pub. L. 106-53 § 342. Unlike the other statutes plaintiffs-appellants cite, the Water Resources Development Act contains express provisions for specific action. Nevertheless, we cannot conclude that enforcement of this provision is likely to remedy Fire Island's shore erosion problem. The Water Resources Development Act does not require the adoption of any specific plan. Nor does the act mandate that defendants-appellees adopt and submit to Congress a *successful* shore erosion plan. While the plan must be "mutually acceptable," by the act's plain language, this term means only that it must be acceptable to the Secretary of the Army and "the heads of other Federal departments and agencies." The plan need not be acceptable to plaintiffs-appellants. Thus, compliance with the Water Resources Development Act would not necessarily make it likely that any plan adopted and submitted to Congress would remedy Fire Island's shore erosion problem.

For the same reason, plaintiffs-appellants do not have standing to assert their claims for injunctive relief under 42 U.S.C. § 1983. Nor do plaintiffs-appellants have standing to assert claims under the Administrative Procedures Act. *See Motor Coach Indus., Inc. v. Dole*, 725 F.2d 958, 963 (4th Cir.1984) (recognizing that standing to assert a claim under the APA requires that "the alleged injury must be such that it likely would be redressed by a favorable decision"). We cannot

conclude that the remedy plaintiffs-appellants seek would likely redress their alleged injuries.

That is not to say that plaintiffs-appellants have no remedy for their purported injuries. While we express no views on the merits of their claim that the defendants-appellees' failure to prevent shore erosion on Fire Island constitutes a de facto taking, the Takings Clause prohibits the government from seizing private property without providing "just compensation." It is not relevant that the government allegedly "took" the property at issue prior to resolving the issue of compensation, as "[t]he Fifth Amendment does not require that compensation precede the taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984). Although plaintiffs-appellants argue that a remedy at law is inadequate, they do not have standing to seek an equitable remedy in this situation. Nor do they convince us that a remedy at law is, in fact, "inadequate."[3]

CONCLUSION

Based upon the foregoing, we affirm the judgment of the United States District Court for the Eastern District of New York.

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[3]However, "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." *Preseault v. ICC*, 494 U.S. 1, 11 (1990) (citations omitted).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NEW YORK COASTAL PARTNERSHIP, INC., et al.,

Plaintiffs, 01-CV-2777

-v.- *Memorandum Of Decision And Order*

UNITED STATES DEPARTMENT OF INTERIOR, et al.

Defendants.

MISHLER, District Judge:

This action concerns erosion of the Fire Island coastline. Plaintiffs claim that Defendants have violated, and continue to violate, the United States Constitution and myriad federal and state laws by their failure to implement the Fire Island Interim Project ("FIIP"). Presently before the Court are motions by both the state and federal defendants to dismiss the Second Amended Complaint, a cross-motion by the Plaintiffs for partial summary judgment, and a motion by Environmental Defense to intervene as a third-party defendant. For the following reasons,

Defendants' motions to dismiss are granted and the motions by Plaintiffs and Environmental Defense are denied.

BACKGROUND

In 1964 Congress passed the Fire Island National Seashore Act ("FINSA"), which places primary responsibility for conserving and preserving the Fire Island coastline with the Department of Interior ("DOI") and the Chief of Engineers.

Department of the Army ("Corps"). Under FINSA, the DOI and the Corps are to settle on a "mutually acceptable" plan to protect the Fire Island National Seashore. 16 U.S.C. § 459e-7(a). However, pursuant to the Flood Control Act of 1970, before the Corps can approve any shore or beach protection measure, such measure must also be endorsed by a "non-Federal interest", presumable the state in which the project will be executed. 42 U.S.C. § 1962d-5b.

In 1995, as part of a comprehensive Reformation Study of the Fire Island Inlet to Montauk Point Project ("Reformulation Study"), the Corps developed the FIIP. The FIIP was conceived of as an interim project, pending completion of the Reformulation Study, which is currently under active review and is scheduled for completion of an active draft environmental impact study in 2004. The parameters of the FIIP are memorialized in a Draft Decision Document and a Draft Environmental Impact Statement, which were prepared by the Corps in 1999. According to these documents, the estimated initial costs of the FIIP would be $52.8 million, and then there would be annual renourishment, monitoring and maintenance costs of $5.2 million for the final five years, for a total estimated cost of $78.8 million.

Since its initial inception, both the DOI and the Corps have concluded that it would not be prudent to proceed with the FIIP. Additionally, the State of New York has not agreed to act asthe requisite "non-Federal interest" for implementing the FIIP.

This action was recommenced on May 4, 2001 by the filing of a summons and complaint. The complaint, as amended, seeks declaratory and injunctive relief against the DOI, the Corps, the State of New York, and numerous individual government officials. Plaintiffs state five causes of action arising out of Defendants' determination not to go forward with the FIIP: (1) "de facto" taking of property in violation of the Fifth and

Fourteenth Amendments of the United States Constitution; (2) deprivation of property in violation of 42 U.S.C. § 1983; (3) violation of the Endangered Species Act, 16 U.S.C. § 1531 et seq ("ESA"); (4) breach of statutory and fiduciary duties arising under the FINSA, the National Park Service Act, 16 U.S.C. § 1 et seq, the Fire Island Wilderness Act, 16 U.S.C. § 1131 et seq, the National Environmental Policy Act, 42 U.S.C. § 4321 et seq, the Coastal Zone Management Act, 16 U.S.C. § 1451 et seq, and the Water Resources and Development Act of 1999, Pub. L. 106-53; and (5) violation of the Federal Administrative Procedures Act, 5 U.S.C. § 701 et seq ("APA"). Plaintiffs move to dismiss the Second Amended Complaint. For the following reasons. Plaintiffs' motions are granted.

DISCUSSION

1. First Cause of Action

Plaintiffs' first cause of action asserts that Defendants' failure to implement the FIIP constitutes a "taking without just compensation" in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The crux of Plaintiffs' claim is that Defendants' failure to implement the FIIP has resulted in the accelerated erosion of Fire Island's coastline and constitutes a "taking" of Defendants' property.

We find that the first cause of action fails to state a viable "takings" claim against any of the Defendants. The Fifth Amendment does not proscribe the "taking of property" in allrespects. It precludes the government from "taking" property "without just compensation." Accordingly, to succeed on a Fifth Amendment takings claim, a plaintiff must demonstrate that he has sought, and was denied, just compensation for the governmental taking. Here, both the federal and the state judicial systems provide adequate post-deprivation remedies by which Plaintiffs might bring an action seeking "just compensation" for the alleged governmental taking. Plaintiffs

could seek redress against the Federal Defendants by way of an action in the United States Court of the Federal Claims. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 520 (1998) ("a claim for just compensation under the Takings Clause must first be brought in the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute"). Similarly, New York State provides adequate procedures by which a plaintiff may seek just compensation for a governmental taking. See *Vaizburd v United States*, 90 F. Supp. 2d 210, 216-17 (E.D.N.Y. 2000)("New York State provides two such 'reasonable, certain and adequate provision[s].'... One is to seek compensation through the procedures detailed in the New York State Eminent Domain Procedure Law... The other is to bring a state law cause of action under Article I, Section 7 of the New York State Constitution"). Plaintiffs have chosen, however, not to avail themselves of these procedures . Thus, Plaintiffs may not seek injunctive relief for the "taking" of their property in this Court. See *Long v. Area Manager Bureau of Reclamation*, 236 F.3d 910, 917 (8th Cir. 2001) ("Equitable relief is not available to enjoin an alleged taking of private property...when a suit for compensation can bebrought against the sovereign subsequent to the taking" (quoting *Ruckelhaus v. Monsanto Co.*, 467 U.S. 304, 321-22 (1984)).

Accordingly, the first cause of action should be dismissed.

2. ***Second Cause of Action***

Plaintiff's second cause of action essentially restates their Fifth and Fourteenth Amendment "takings clause" claim as a member under 42 U.S.C. § 1983. The Second Amended Complaint alleges that "[b]y participating with the Federal Defendants in the defacto takings and deprivations of Plaintiffs' property rights and breaching their duties under the Federal and State law and their promises to mitigate the damages caused,

and to protect and preserve the resources of FINS and the properties of the FINS property owners, the State Defendants have deprived Plaintiffs of their constitutionally protected rights in violation of 42 U.S.C. Section 1983."

Second Amended Complaint ¶ 98.

We find the second cause of action is precluded by the doctrine of sovereign immunity.[1]

"As a general matter, the Eleventh Amendment bars suits of any sorts against a state in federal court unless the state has consented to be sued or Congress has expressly abrogated the state's immunity." *Kostok v. Thomas*, 105 F. 3d 65, 68 (2d Cir. 1997). In enacting 42 U.S.C.§ 1983, Congress did not expressly abrogate the states' sovereign immunity. See *Will v. Michigan Dep't of State Police, et al.*, U.S. 58, 71 (1981). Accordingly, in the absence of a state waiver of sovereign immunity, which is not present in this case, states are not subject to suite under 42 U.S.C. § 1983 in federal courts.

In asserting the viability of their second cause of action, Plaintiffs rely on the exception to sovereign immunity first set forth in *Ex Parte Young*, 209 U.S. 123 (1908). The *Young* exception applies to suits seeking injunctive or declaratory relief against state officers whose ongoing action or threat of action violates a specific and ongoing federal law. See *West 95 Housing Corp. v. New York City Dept. of Housing Preservation and Development*, No. 01 CV 1345, 2001 WL 664628, *7

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[1]To the extent that Plaintiffs seek to assert this cause of action against the federal defendants, this claim must also fail. See *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1988) (claim may not be made under § 1983 against federal employees acting in their official capacity : *Lehman v. Kornblau* 134 F. Supp. 2d 281, 295 (E.D.N.Y. "The plaintiff also seeks damages against [the defendant] in her individual capacity for alleged violations of his constitutional rights under 42 U.S.C. § 1983, which is limited to state actors and does not apply to federal employees")

(S.D.N.Y. June 12, 2001), *aff'd* 2002 WL 355951 (2d Cir. 2000). Here, although the Second Amended Complaint demands injunctive and declaratory relief, Plaintiffs' claim does not qualify under the *Young* exception because they have not isolated a viable "specific and ongoing" federal violation. Plaintiffs' § 1983 action is premised on violation of their rights under the "takings" clause of the Fifth and Fourteenth Amendments.

However, as set forth above, Plaintiffs have not been denied "just compensation" for any alleged taking, and thus are not victims of a violation of federal law. See *Hellenic American Neighborhood Action Committee v. City of New York*, 101 F.3d 877, 880-81 (2d Cir. 1996) (holding that alleged state violation of a constitutionally protected property interest is not actionable under § 1983 where the state provides a meaningful post-deprivation remedy.)

Accordingly, Plaintiffs may not rely on the *Young* exception to sovereign immunity, and the second cause of action should be dismissed.

3. *Third Cause of Action*

Plaintiffs' third cause of action asserts a violation of the ESA. Plaintiffs assert that the Fire Island beach erosion has resulted in a loss of habitat for the piping plover (charadrius melodus). Thus, Plaintiffs assert, Defendants' failure to remedy the Fire Island beach erosion constitutes the "take" of an endangered species in violation of the ESA.

Plaintiffs' third cause of ation must fail because Plaintiffs have not identified any conduct, in which the Defendants have engaged, which can serve as the basis of an action under the ESA. The ESA provides, in relevant part that:

[A]ll federal departments and agencies shall seek to

> conserve endangered species and shall utilize their authorities in furtherance of the purpose of this chapter....
>
> Each Federal agency shall, in connection with and with the assistance fo the Secretary [of the Interior] insure that any *action authorized funded or carried out* by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary ...to be critical

16 U.S.C. §§ 1531(c)(1); 1536(a)(2) (emphasis added). Additionally, the ESA makes it unlawful to "take" an endangered species. 16 U.S.C. § 1538(a)(1)(B). The term "take" is defined to include "harm", which in turn is defined as any act that "actually kills or injures wildlife" including "significant habitat modification or degradation" that "actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R 17.3.

Here, although Plaintiffs plead a significant modification of the piping plover's habitat by virtue of the Fire Island coastline erosion, Plaintiffs do not charge that any conduct by theDefendants is responsible for this alleged "take." In an attempt to link Defendants to the habitat degradation, Plaintiffs initially point to the Defendants failure to remedy the coastline erosion through the FIIP. This claim, however, relies only Defendants discretionary *in*action. It does not allege any unlawful conduct. In apparent recognition of this fault, Plaintiffs claim that the damage to the Fire Island coastline, and in turn to the piping plover's habitat, is a result of the Defendants' participation in a 1971 project whereby groins were created in and around Westhamption Beach, New York. Defendants participation in this 1971 project, however, may not serve as the predicate conduct: to an ESA claim, both because

it pre-dates the 1973 effective date of the ESA, and because the statue of limitations on an ESA claim arising out of thisconduct has long expired.[2] Therefore, Plaintiffs have isolated no act, by any of the defendants, which support its claim under the ESA.

Accordingly, the third cause of action should be dismissed.

4. ***Fourth Cause of Action***

Plaintiff's fourth cause of action asserts that, by failing to implement the FIIP, Defendants breached their duties under numerous statutes Upon review of the relevant statutory sections and the parties' arguments. We find that Plaintiffs have failed to state a viable claim under any of these statutes.

A. FINSA

Although Plaintiffs reference several statutes with respect to the fourth cause of action, their memoranda centers around alleged violation of the FINSA. Plaintiffs, however, may notproperly assert, a claim against Defendants under the FINSA, because the FINSA does not waive the Federal Defendants' sovereign immunity, and Plaintiffs have failed to demonstrate that the State Defendants have violated any affirmative duty under the FINSA.

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). "The Supreme Court has clearly stated that an 'unequivocal expression' of waiver of sovereign immunity must be in the text of the relevant statute for a claim

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[2] The ESA does not contain an express state of limitations. Therefore, with respect to the federal defendants, we apply the six year state of limitations generally applicable to civil actions against the federal government 28 U.S.C. § 2401(a); *Alsea Valley Alliance v. Evans* 161 F. Supp.2d 1154, 1160 (D Ore. 2001). With respect to the state defendants, we apply the five year state of limitations for actions to enforce a civil fine or penalty. 28 U.S.C. § 2452. Both of these statute of limitations have long expired.

to go forward." *Raymond Proffitt Foundation v. U.S. Army Corps of Engineers*, 175 F. Supp. 2d 755, 755 (E.D. Penn. 2001) (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992)). Plaintiffs bear the burden of establishing an explicit waiver of the government's sovereign immunity. Id.; *United Tribe of Shawnee Indians v. United States*, 55 F. Supp. 2d 1238, 1243 (D. Kan. 1999).

Here, Plaintiffs have entirely failed to point to anything in the text of the FINSA that could be construed as a waiver of sovereign immunity. Therefore, Plaintiffs' claim against the Federal Defendants under the FINSA must be dismissed.

Plaintiffs also fail to state a valid claim against the State Defendants. Plaintiffs have not highlighted anything in the FINSA which creates an affirmative duty on the State to act. Pursuant to the FINSA, the DOI and the Corps are charged with the responsibility to reach a "mutually acceptable" plan to address shore erosion on Fire Island. Even if the framers of this statute expected the State of New York to participate as the "non-federal interest" in implementing such "mutually acceptable" plan, Plaintiffs have nto directed the Court to any language in the FINSA that imposes an *affirmative duty* on the State Defendants to so act.

Furthermore, even if the FINSA did require the State Defendants to act with respect to the Fire Island coastal erosion, there is no basis for Plaintiffs' claim that Defendants are required to undertake the particular course of action that Plaintiffs endorse . This is especially true considering the fact that the FIIP has never been adopted as a "mutually acceptable" plan by the DOI and the Corps. Thus, Plaintiffs have failed to point to any duty under the FINSA that the State Defendants have breached.

Accordingly, Plaintiffs' claims arising under the FINSA should be dismissed.

5. ***Fifth Cause of Action***

Plaintiffs' fifth cause of action is brought under the APA. It asserts that, by failing to implement the FIIP, the DOI and the Corps have failed to perform their duty under the FINSA to develop an erosion protection plan.

We find this claim to be meritless, both because the agency action that Plaintiffs wish to compel is discretionary, and because there has been no "final agency action" for which redress can be sought under the APA.

First, we find that the DOI and the Corps' failure to act with regard to the FIIP is not actionable. An agency's decision not to take a executive action is "presumed immune from judicial review under section 701(a)(2)" of the APA. *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). Although the FINSA charges the DOI and the Corps with the responsibility of protecting the Fire Island Shoreline, it does not mandate that those agencies implement any particular project. The DOI and the Corps have discretion as to the best manner to effect the FINSA's mission. See *Raymond Proffitt Foundation*, 175 F. Supp.2d at 767 ("the environmental protection mission was placed upon the Corps as a whole, not upon each individual water resources project. The Corps has the discretion to apply this statutory mission to water resources projects that it operates, but is not obligated to implement it at any particular one"). Accordingly, the DOI and the Corp's inaction with regard to the FIIP is precluded from judicial review.

Additionally, Defendants' inaction with regard to the FIIP

B. Other Statutes

In addition to the FINSA, Plaintiff's assert that Defendants' conduct, or lack thereof, violates statutory and fiduciary duties arising under the National Park Service Act, 16 U.S.C. § *et seq.*, the Fire Island Wilderness Act, 16 U.S.C. § 1131 *et seq.*, Management Act, 16 U.S.C. § 1451 *et seq.*, and the Water

Resources and Development Act of 1999, Pub. L. 106-53.

For the same reasons that Plaintiffs' FINSA claim is defective, however, Plaintiffs have failed to state a meritorious cause of action under any of these statutes . Plaintiffs have not demonstrated a valid waiver of sovereign immunity with respect to any of these statutes. Nor have Plaintiffs demonstrated how any of these statutes imposed a mandatory obligation on the State Defendants which Plaintiffs may enforce through this private action.

In that Plaintiffs have n established any actionable violation of federal law, and this Court will not retain supplemental jurisdiction to consider the state law claims, the fourth cause of action should be dismissed.

5. ***Fifth Cause of Action***

Plaintiffs' fifth cause of action is brought under the APA. It asserts that, by failing to implement the FIIP, the DOI and the Corps have failed to perform their duty under the FINSA to develop an erosion protection plan.

We find this claim to be meritless, both because the agency action that Plaintiffs wish to compel is discretionary, and because there has been no "final agency action" for which redress can be sought under APA.

First, we find that the DOI and the Corps' failure to act with regard to the FIIP is not actionable. An agency's decision not to take an executive action is "presumed immune from judicial review under section 701(a)(2)" of the APA. *Heckler v. Chaney*, 470 U.S. 821, 831-2(1985). Although the FINSA charges the DOI and the Corps with the responsibility of protecting the Fire Island Shoreline, it does not mandate that those agencies implement any particular project. The DOI and the Corps have discretion as to the best manner to effect the FINSA's mission. See *Raymond Proffitt Foundation*, 175 F.Supp.2d at 767 ("the environmental protection mission was

placed upon the Corps as a whole, not upon each individual water resources project. The Corps has the discretion to apply this statutory mission to water resources projects that it operates, but is not obligated to implement it at any particular one"). Accordingly, the DOI and Corp's inaction with regard to the FIIP is precluded from judicial review.

Additionally, Defendants' inaction with regard to the FIIP does not constitute "final agency action," and thus may not be the subject of an APA claim. To state a cognizable claim under the APA, a plaintiff must challenge "a final agency action" for which "there is no other adequate remedy in a court". 5 U.S.C. § 704. The Second Circuit employs a "pragmatic" approach to determining whether an agency action is "final" within the meaning of the APA. Here, it is well-established that the FIIP was envisioned as only a temporary remedial measure, as a subset to the Reformulation Study. Goldberg Declaration, Ex. 1, pp. 1, 67. Indeed, the Reformulation Study is currently in progress, and a "draft impact statement" is slated to be prepared in 2004. *Id.* Under these circumstances, the FIIP, and particularly the Defendants' inaction with respect to the FIIP, could hardly be categorized as a "final agency action." See *United Tribe of Shawnee Indians*, 55 F. Supp.2d at 1246 ("The evidence indicates that the agency is currently considering additional comments and that no final [finding] or environmental impact statement has been issued. Accordingly, plaintiff has failed to established final agency action and the court has no jurisdiction over the NEPA claim").

Accordingly, Plaintiffs' claim under the APA should be dismissed.

CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss the Second Amended Complaint are GRANTED. Plaintiffs'

cross-motion for partial summary judgment is DENIED.

Environmental defense motion for leave to intervene as a party defendant is, accordingly, DENIED as moot. The Clerk is directed to enter judgment in favor of Defendants and against Plaintiffs dismissing the Second Amended Complaint

Dated: April 19, 2002

Central Islip, New York

_____/s/_____

Jacob Mishler

U.S. District Judge

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 17 Day of December, two thousand four

NYCP v. DOI

A petition for panel rehearing and a petition for rehearing en banc having been filed by thr appellant New York Coastal, et al.

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing be DENIED.

It is further noted that the petitions for rehearing en banc have been transmitted to the judges for the Court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court
Roseann B. Mackechnie

By: /s/
Arthur Heller
Motion Staff Attorney

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Amendment V:

* * * * Nor shall private property be taken for public use, without just compensation.

* * * *

Administrative Procedure Act:

5 U.S.C. § 551(13):

"agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

5 U.S.C. § 702:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute. * * * *

5 U.S.C. § 706:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or

unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

* * * *

Declaratory Judgment Act, 28 U.S.C. 2201

(a) In a case of actual controversy within its jurisdiction * * * any court of the United States may upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. [* * * *]

* * * *

Tucker Act, 28 U.S.C. § 1491

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. [* * * *]

* * * *

Fire Island National Seashore Act, Pub. L. 88-587, 16 U.S.C. §§ 459e, *et seq.*:

§ 459e. **Fire Island National Seashore**

(a) Purposes; authorization for establishment

For the purpose of conserving and preserving for the use of future generations certain relatively unspoiled and undeveloped beaches, dunes, and other natural features within Suffolk County, New York, which possess high values to the Nation as examples of unspoiled areas of great natural beauty in close proximity to large concentrations of urban population, the Secretary of the Interior is authorized to establish an area to be known as the "Fire Island National Seashore".

(b) Boundaries

The boundaries of the national seashore shall extend from

the easterly boundary of the main unit of Robert Moses State Park eastward to Moriches Inlet and shall include not only Fire Island proper, but also such islands and marshlands in the Great South Bay, Bellport Bay, and Moriches Bay adjacent to Fire Island as Sexton Island, West Island, Hollins Island, Ridge Island, Pelican Island, Pattersquash Island, and Reeves Island and such other small and adjacent islands, marshlands, and wetlands as would lend themselves to contiguity and reasonable administration within the national seashore and, in addition, the waters surrounding said area to distances of one thousand feet in the Atlantic Ocean and up to four thousand feet in Great South Bay and Moriches Bay and, in addition, mainland terminal and headquarters sites, not to exceed a total of twelve acres, on the Patchogue River within Suffolk County, New York, all as delineated on a map identified as "Fire Island National Seashore", numbered OGP-0004, dated May 1978. The Secretary shall publish said map in the Federal Register, and it may also be examined in the offices of the Department of the Interior.

§ 459e-1. Acquisition of property

(a) Authority of Secretary; manner and place; concurrence of State owner; transfer from Federal agency to administrative jurisdiction of Secretary; liability of United States under contracts contingent on appropriations

The Secretary is authorized to acquire, and it is the intent of Congress that he shall acquire as appropriated funds become available for the purpose or as such acquisition can be accomplished by donation or with donated funds or by transfer, exchange, or otherwise, the lands, waters, and other property, and improvements thereon and any interest

therein, within the boundaries of the seashore as established under section 459e of this title. * * * *

(b) Establishment; notice in Federal Register

When the Secretary determines that lands and waters or interests therein have been acquired by the United States in sufficient quantity to provide an administrative unit, he shall declare the establishment of the Fire Island National Seashore by publication of notice in the Federal Register.

[* * * *]

(e) Limitation of condemnation power during existence of zoning ordinance; Davis Park-Smith Point County Park area exception; beneficial owner's election of alternatives as condition for acquisition

With one exception the Secretary shall not acquire any privately owned improved property or interests therein within the boundaries of the seashore or any property or interests therein within the communities delineated on the boundary map mentioned in section 459e of this title, except beach or waters and adjoining land within such communities which the Secretary determines are needed for public access to the beach, without the consent of the owners so long as the appropriate local zoning agency shall have in force and applicable to such property a duly adopted, valid, zoning ordinance that is satisfactory to the Secretary. The sole exception to this limitation on the power of the Secretary to condemn improved property where appropriate zoning ordinances exist shall be in the approximately eight-mile area from the easterly boundary of the Brookhaven town park at Davis Park, in the town of

Brookhaven, to the westerly boundary of the Smith Point County Park. In this area only, when the Secretary deems it advisable for carrying out the purposes of sections 459e to 459e-9 of this title or to improve the contiguity of the park land and ease its administration, the Secretary may acquire any land or improvements therein by condemnation. In every case in which the Secretary exercises this right of condemnation of improved property the beneficial owner or owners (not being a corporation) of any improved property so condemned, provided he, she, or they held the same or a greater estate in the property on July 1, 1963, may elect as a condition of such acquisition by the Secretary any one of the following three alternatives:

(1) that the Secretary shall take the said property in fee simple absolute and pay the fair market value thereof as of the date of such taking;

(2) that the owner or owners shall retain a life estate in said property, measured on the life of the sole owner or on the life of any one person among multiple owners (notice of the person so designated to be filed in writing with the Secretary within six months after the taking) or on the life of the survivor in title of any estate held on July 1, 1963, as a tenancy by the entirety. The price in such case shall be diminished by the actuarial fair market value of the life estate retained, determined on the basis of standard actuarial methods;

(3) that the owner or owners shall retain an estate for twenty-five years. The price in this case shall likewise be diminished by the value of the estate retained.

(f) "Improved property" defined

The term "improved property" as used in sections 459e to 459e-9 of this title shall mean any building, the construction of which was begun before July 1, 1963, and such amount of land, not in excess of two acres in the case of a residence or ten acres in the case of a commercial or industrial use, on which the building is situated as the Secretary considers reasonably necessary to the use of the building: *Provided*, That the Secretary may exclude from improved properties any beach or waters, together with so much of the land adjoining such beach or waters as he deems necessary for public access thereto.

[* * * *]

§ 459e-3. Retention by owner of right of use and occupancy of improved property for residential purposes

(a) Time limit; value of reserved right

Owners of improved property acquired by the Secretary may reserve for themselves and their successors or assigns a right of use and occupancy of the improved property for noncommercial residential purposes for a term that is not more than twenty-five years. The value of the reserved right shall be deducted from the fair market value paid for the property.

(b) Termination of right; compensation

A right of use and occupancy reserved pursuant to this section shall be subject to termination by the Secretary upon his determination that the use and occupancy is not

consistent with an applicable zoning ordinance approved by the Secretary in accordance with the provisions of section 459e-2 of this title, and upon tender to the owner of the right an amount equal to the fair market value of that portion of the right which remains unexpired on the date of termination.

[* * * *]

§ 459e-6. Administration, protection, and development

(a) Conservation of natural resources of Seashore; preservation and access to Sunken Forest Preserve

The Secretary shall administer and protect the Fire Island National Seashore with the primary aim of conserving the natural resources located there. The area known as the Sunken Forest Preserve shall be preserved from bay to ocean in as nearly its present state as possible, without developing roads therein, but continuing the present access by those trails already existing and limiting new access to similar trails limited in number to those necessary to allow visitors to explore and appreciate this section of the seashore. [* * * *]

§ 459e-7. Shore erosion control or beach protection measures; Fire Island inlet

(a) Authority of Chief of Engineers

The authority of the Chief of Engineers, Department of the Army, to undertake or contribute to shore erosion control or

beach protection measures on lands within the Fire Island National Seashore shall be exercised in accordance with a plan that is mutually acceptable to the Secretary of the Interior and the Secretary of the Army and that is consistent with the purposes of sections 459e to 459e-9 of this title.

[* * * *]

OTHER MATERIALS

[December 17, 1999 Letter from Joseph W. Westphal, Assistant Secretary of the Army (Civil Works) to Hon. J. Dennis Hastert]

Honorable J. Dennis Hastert
Speaker of the House
of Representatives
House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Section 342 of the Water Resources Development Act of 1999 (WRDA 1999) directs the Secretary of the Army, in coordination with the heads of other Federal departments and agencies, to complete all procedures and reviews expeditiously and to adopt and submit to Congress, not later than 120 days after the date of enactment of the Act a mutually acceptable shore erosion plan for the Fire Island inlet to Moriches inlet reach of the Fire Island to Montauk Point, New York, project.

We are pleased to be able to inform you that on December 6, 1999, the Army Corps of Engineers New York District released, for public and agency review a draft decision document and draft environmental impact statement (DEIS) for the Fire Island, New York, Interim Project. My staff have worked closely with staff from the Corps, the Department of the Interior (DOI), and the State of New York since the execution of the *Fire Island, New York Interim Project Partnership Agreement (Partnership Agreement)* in July 1999, to address a number of complex issues regarding project design and implementation. We believe that the release of the draft decision document and the DEIS constitutes a key procedural step in accordance with the Section 342 requirement to expeditiously accomplish all procedures and reviews. Additionally, the Corps will continue its fish and Wildlife

Coordination act and Endangered Secies Act requirement. The Corps plans to complete the final decision document and EIS during the Spring of 2000 and be in a position to sign a Record of Decision by July 2000.

The *Partnership Agreement* established that the Corps would propose a minimum duration project that could be justified economically, a six-year project defined as initial placement (with advance nourishment), and one scheduled renourishment episode. These elements of the draft plan are mutually acceptable as required by Section 342. For your convenience, we have enclosed the Partnership Agreement and relevant exerpts from the draft decision document and the DEIS.

The comment period for the draft decision document and DEIS ends on January 31, 2000. The Corps will consider all comments received as they work to produce the final documents next Spring that will make a final recommendation for the interim project. The Corps will continue to work with DOI staff to ensure that the final documents can be embraced by both agencies. Additionally, the Corps will continue to consult with DOI staff on matters pertaining to the consistency of the interim project with the enabling legislation of the Fire Island National Seashore and the National Park Service's policies on beach nourishment.

One challenging issue that remains unresolved is how to address concerns about expansion of existing development and new development that might occur as a result of implementation of the interim project. We will continue to explore options for addressing communities over the coming months. We are hopeful that a mutually acceptable solution to this issue will emerge as a result of the public and agency review period for the draft decision document and DEIS.

Please do not hesitate to contact me if you have any questions.

Sincerely,

_____/s/_____

Joseph W. Westphal
Assistant Secretary of the Army
(Civil Works)

[Letter from Congressional Leaders to Secretary Babbit]

Congress of the United States
House of Representatives
Washington, DC 20515

January 16, 1996

Honorable Bruce Babbitt
Secretary of the Interior
Department of the Interior
Washington, D.C. 20240

Dear Mr. Secretary:

We seek your assistance in promoting a speedy resolution to the few issues that stand in the way of a much-needed Interim Project that will provide erosion protection to Fire Island, New York, and flood protection to Long Island's south shore. We understand that there has been difficulty in resolving some issues that have arisen between the action agency [the U.S. Army Corps of Engineers (COE)], and the project sponsor [the New York State Department of Environmental Conservation (NYSDEC)] on the one hand, and the U.S. Department of the Interior (DOI) through the U.S. Fish and Wildlife Service (FWS) and the National Park Service (NPS) on the other.

We are told that the primary concerns of the involved parties center around the relationship between the Interim Project and a future and more comprehensive, longer-term project that will be based on a Reformulation Study covering an 83-mile stretch of coastline. The Reformulation Study and an associated Environmental Impact Statement (EIS) will not be completed until at least 2003, with Study recommendations taking many additional years to implement. Based on the

history of storm damage at Fire Island over the past decade, we fear that unless the Interim Project moves forward quickly, the barrier island may be in danger of breaching. This may place the safety of thousands of Long Islanders in jeopardy and may result in damage to property, business and infrastructure, as well as coastal ecosystems, including portions of the Fire Island National Seashore and Wildness Area and the Great South Bay. As we understand, the DOI has expressed concerns that the Reformulation Study EIS will not be completed, and that the interim project could be a stand-alone project for 30 years.

Attempts to resolve concerns over the scope and magnitude of the interim project have been ongoing, however, we are told that the parties have come to an impasse over the State's requirement for a 30-year life on the Interim Project, the COE's engineering and benefit analysis over this time frame, and FWS' reluctance to authorize a 30-year "Interim" project without an up-front EIS. Further, we have been informed that the COE and New York State have negotiated several potential means for resolving this issue, however, each time that an agreement on the Interim project appears close, DOI representatives seem to reconsider their position causing further delay.

The parties are committed to proceeding with the more extensive Reformulation Study and to the full EIS that would accompany the Study. However, the short term risk of catastrophic storm damage has fostered a sense of urgency to proceed with the Interim Project as quickly and prudently as possible. We trust that a solution can be found that will satisfactorily address the issues concerning the Interim Project. Therefore, we would appreciate your assistance in helping to resolve any outstanding issues of concern with respect to preceding with the Interim Project.

Thank you for your prompt attention to this matter.

Sincerely,

ALFONSE M. D'AMATO
UNITED STATES SENATOR

DANIEL PATRICK MOYNIHAN
UNITED STATES SENATOR

RICK LAZIO
MEMBER OF CONGRESS

MICHAEL FORBES
MEMBER OF CONGRESS

[D. Ct. Declaration of Clifford Jones, III, Project Manager, U.S. Army Corps of Engineers]

DECLARATION OF CLIFFORD JONES, III

[District Court caption omitted]

CLIFFORD JONES III declares as follows:

1. I am a Project Manager with the Programs and Project Management Division, New York District, U.S. Army Corps of Engineers (the "Corps"). This Declaration is respectfully submitted in support of the motion of the Corps and co-defendant United States Department of the Interior ("DOI") to dismiss complaint in this action. This Declaration is based upon information known to me in my capacity as a Project Manager for the Corps, and upon correspondence and other official business records of the Corps.

2. My responsibilities as Project Manager include oversight and coordination of New York District actions regarding ongoing and planned shore erosion control and protection projects sited on the south shore of Long Island, New York. Among those projects is the Fire Island Interim Project, a subject of this litigation (the "Project").

3. The Project concerns lands within the Fire Island National Seashore. The Project plan currently is not mutually acceptable to the Secretary of the Interior and the Secretary of the Army. Moreover, the State of New York has not entered into a written agreement to furnish cooperation for the Project in its current form, or agreed to enter into such an agreement.

4. Based on the foregoing, the Corps does not intend to

proceed with the Project at this time.

I declare under penalty of perjury that the foregoing statements are true and accurate to the best of my knowledge information and belief

Dated: New York, New York

October 24, 2001

_____/s/_____

Clifford Jones III
Project Manager, United States
Army Corps of Engineers

[D. Ct. Affidavit of Constantine J. Dillon, Superintendent of Fire Island National Seashore]

DECLARATION OF CONSTANTINE J. DILLON

[District Court caption omitted]

CONSTANTINE J. DILLON declares as follows:

1. I am the Superintendent of Fire Island National Seashore. This Declaration in respectfully submitted in support of the motion of the United States Department of the Interior (DOI) and co-defendant the Army Corps of Engineers, to dismiss the complaint in this action. This Declaration is based upon information known to me in my capacity as Superintendent of Fire Island National Seashore, and upon correspondence and other official business records of the National Park Service and the Department of the Interior.

2. My responsibilities as Superintendent include management of all aspects of Fire Island National Seashore including daily operations, long term and short term planning, completion of environmental compliance, and issuing of permits. This includes ongoing and planned shore management and protection projects sited within, or directly affecting, Fire Island National Seashore, New York. Among those projects is the Fire Island Interim Project, a subject of this litigation (the "Project").

3.The Project concerns lands and waters within Fire Island National Seashore. The Project plan as propose din the Draft Environmental Impact Statement (DEIS) and Draft Decision Document (DDD) issued by the Army Corps of Engineers is not acceptable to the National Park Service.

I declare under penalty of perjury that the foregoing

statements are true and accurate to the best of my knowledge information and belief.

Dated: New York, New York
November 27, 2001

/s/
CONSTANTINE J. DILLON
Superintendent, Fire Island
National Seashore

U.S. Army Corps of Engineers, New York District
Fact Sheet,
(available at http://www.nan.usace.army.mil/project/newyork/factsh/pdf/fimp.pdf) (last visited May 30, 2005)

Fire Island Inlet to Montauk Point, NY
FACT SHEET

DESCRIPTION: The authorized project provides for hurricane protection and beach erosion control along five reaches of the south shore of Long Island between Fire Island Inlet and Montauk Point, a distance of approximately 83 miles. The authorized project includes widening of the beaches along the developed areas between Kismet and Mecox Bay to a minimum width of 100 feet at an elevation of 14 feet above mean sea level and raising of dunes to an elevation of 20 feet above mean sea level from Fire Island Inlet to Hither Hills State Park, and at Montauk and opposite Lake Montauk Harbor by artificial placement of suitable sand; grass planting of the dunes and interior drainage structures at Mecox Bay, Sagaponack Lake and Georgica Pond. The project authorizes up to 50 groins subject to future determination of their actual need, based on experience. The project also authorizes Federal participation in periodic nourishment. The project sponsor is the New York State Department of Environmental Conservation.

BACKGROUND: In accordance with the National Environmental Protection Act (NEPA), an Environmental Impact Statement (EIS) was prepared and filed with USEPA in January 1978. In March 1978, the Department of the Interior (DOI) supported by other agencies referred the EIS to the

Council on Environmental Quality (CEQ) as unacceptable. In June 1978, CEQ recommended project reformulation to the Chief of Engineers, who in turn directed the District to reformulate the project. Reformulation was originally initiated in 1980; however, because of difficulties between the Federal, State and County in proceeding with Reach 2, Westhampton, which at the time was the most vulnerable reach of the authorized project, reformulation was suspended. Based on letters of intent to support an interim plan for Reach 2, the reformulation study was resumed.

AUTHORIZATION: The project is authorized by the Rivers and Harbors Act of 14 July 1960 in accordance with House Document 425 and subsequently modified by the River & Harbor Act of 1962, and the Water Resources Development Acts of 1974, 1986 and 1992.

STATUS: Completed Work:

MORICHES INLET TO SHINNECOCK INLET (Reach 2) â•" 11 groins constructed in the Westhampton Beach area in 1965. Additional 4 groins with beach and dune fill placed west of the 11-groin field in 1969-1970. The Westhampton Interim Project, which included groin modification and beachfill within and west of the 15-groin field was substantially completed in December 1997.

SOUTHAMPTON to BEACH HAMPTON: (Reach 4) 2 groins constructed at Georgica Pond in 1965.

Ongoing Work:

PROJECT REFORMULATION: Studies for a comprehensive reformulation study were initiated in 1994 in accordance with an

Initial Project Study Plan dated June 1993. The goal of the reformulation study is to identify and evaluate alternative methods of providing the authorized beach erosion control and hurricane protection. An Environmental Impact Statement (EIS) is being prepared for the reformulation effort. Initial work involved data collection including beach profile surveys of the 83-mile shoreline and topographic mapping of flood prone areas. Studies are continuing including coastal processes modeling, storm damage assessments, environmental data collection, plan formulation alternative screening and potential mitigation measures. Based on initial scoping sessions for the reformulation study, an Interagency Reformulation Group was developed as well as several Technical Management Groups to handle specific aspects of the overall study. As a result, the Project Study Plan was revised dated June 1996. The cooperating agencies, including the State of New York and the US Department of Interior, have discussed further revisions to the reformulation study plan resulting in the current Project Management Plan dated June 2000, which increases the study scope, time and cost of the prior plan. A Design Agreement has been signed to cost-share the increased costs with the State of New York.

Draft Report / EIS	November 2006
Scheduled Study completion:	June 2007
Total Study Cost:	$24 million

INTERIM ACTIONS: State, local and congressional interests have requested that the District evaluate plans to provide immediate remedial action for vulnerable areas. These interim actions would be modified, as necessary, based on the recommendations of the reformulation study.

BREACH CONTINGENCY PLAN: Provides a mechanism for rapid breach closure of the barrier islands throughout the 83-mile project area. A Breach Contingency Plan (BCP) Report was approved in February 1996. Under the approved generic Project Cooperation Agreement, the District Commander is authorized to execute specific PCA's with the State to close breaches after coastal storms.

WESTHAMPTON INTERIM PROJECT: Provides interim protection to the Westhampton Beach area west of Groin 15 and affected mainland communities north of Moriches Bay. The project provides for a protective beach berm and dune, tapering of existing groins 14 and 15 and construction of an intermediate groin (14a). The project also includes periodic nourishment, as necessary to ensure the integrity of the project design, for up to 30 years (2027). Initial construction was completed in December 1997 at a cost of approximately $20 million. The project has performed better than anticipated in terms of anticipated cost, project performance and beneficial environmental impacts. The first renourishment began in November 2000 and was substantially completed in February 2001 at a cost of approximately $5 million. Coastal and environmental monitoring are continuing. The second renourishment is underway. The contract was awarded in September 2004 at a cost of $4.5 M. Sand placement operations began in October 2004 and will conclude in December 2004.

FIRE ISLAND INTERIM STUDY: The Corps, the State of New York and the Department of Interior have been engaged in extensive coordination to develop a mutually acceptable interim plan along the Fire Island barrier island to provide protection until the implementation of the recommendations of the overall

reformulation study. As specified in a partnering agreement between the Corps and the USDOI, any proposed interim project would consist of initial beachfill placement with one renourishment for a period not to exceed 6 years. The Draft Decision Document and DEIS were submitted for public review in December 1999 and a public meeting was held in January 2000. Based on the lack of a non-federal sponsor for this project, efforts will focus on development of a comprehensive plan thru the reformulation study. The extensive comments from the USDOI and other resource agencies as well as the general public on the Fire Island interim project will be incorporated in the preparation of the Reformulation study EIS.

WEST OF SHINNECOCK INTERIM PROJECT: An evaluation has been completed to provide interim protection to the area immediately west of Shinnecock Inlet, which is seriously eroded and a potential breach area (where the ocean and the bay meet). The proposed project is intended to provide protection to bridge the gap until the implementation of the recommendations of the reformulation study; therefore, it is currently proposed that an interim project would consist of initial beachfill placement with two renourishments for a period not to exceed 6 years. Based on comments from the State of New York, a biological sampling of the proposed offshore borrow area was initiated in April 1999; piping plover monitoring is ongoing for the placement area. The Draft Decision Document and Draft Environmental Assessment was submitted for public review in December 1999. The State of New York supports this project and has agreed to provide the non-Federal share of the project cost. The PCA was executed December 2003. A contract was awarded in September 2004 at a cost of $4.3 M. Sand placement is scheduled to begin in

December 2004 and be completed in February 2005.

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[Press Release of National Parks Conservation Association, March 14, 2000]

National Parks Magazine
Press Room
National Parks Reports
Park Watcher Newsletters
Other Publications

NPCA Press Releases

FOR IMMEDIATE RELEASE: March 14, 2000
CONTACT: Laura Loomis, NPCA (202) 223-6722, x233

Park Watchdog Group Honors Constantine J. Dillon
PRS Superintendent Receives $2,500 Award for Exemplary Work to Protect Fire Island NS

Patchoque, NY – The National Parks Conservation Association (NPCA) today presented the 2000 Stephen Tyng Mather Award to Constantine J. Dillon, Superintendent of Fire Island National Seashore. The $2,500 award was presented by Laura Loomis, NPCA Acting Director of Visitor - Use and Experience. Named for the first director of the National Park Service (NPS), the Mather award recognizes those individuals who have demonstrated initiative and resourcefulness in promoting environmental principles and protecting the natural resources of a park in a situation where others have hesitated.

The battle to protect Fire Island began when the Army Corps of Engineers tried to implement a shoreline stabilization

project to protect private property. Insisting that a complete environmental impact statement be performed with proper alternatives and public comment, Dillon faced castigation from the press, the public and elected officials. These pressures culminated in a press conference in front of the park that called for his resignation.

Dillon has also faced extensive public and congressional pressure to use pesticides in the Fire Island Wilderness Area, the only federally designated wilderness in New York state. He maintained the protection of the wilderness by developing a proactive plan to monitor mosquitos and provide public information on mosquito-borne diseases to alleviate public concern, thus keeping pesticides out of the protected ecosystem. Dillon also has initiated other activities that led to the expansion of the wilderness area and improved management of the park. He also created partnerships with other agencies and private organizations that resulted in the restoration of the park's salt marshes.

"Constantine Dillon exemplifies the type of persistence a Mather award winner must have," said Tom Kleran, NPCA President. "He placed the welfare of the park above his own and fought for what was best for the resource against strong opposition."

The National Parks Conservation Association is America's only private nonprofit organization dedicated solely to protecting, preserving, and enhancing the National Park System, NPCA was founded in 1919 and today has more than 400,000 members. NPCA- Protecting Parks for Future Generations.

A library of national park information, including fact sheets, congressional testimony, position statements, press releases and media alerts, can be found on NPCA's World Wide Web site at www.npca.org.

Supreme Court, U.S.
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No. 04-1612

In the Supreme Court of the United States

NEW YORK COASTAL PARTNERSHIP, INC., ET AL.,
PETITIONERS

v.

DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners have standing to seek a judicial order directing federal agencies to adopt and submit to Congress an erosion-control plan for New York's Fire Island, when those agencies have broad discretion to craft a plan that need not address petitioners' alleged harm, and when the federal agencies' implementation of any plan is legally contingent upon a non-federal party's agreement to participate in funding and carrying out the plan.

2. Whether the district court had jurisdiction over petitioners' claim to enjoin governmental actions that allegedly effected a taking of their property, when petitioners have not sought just compensation in the Court of Federal Claims as authorized under the Tucker Act, 28 U.S.C. 1491, and do not allege that Congress has withdrawn the Tucker Act remedy.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Allen v. *Wright*, 468 U.S. 737 (1984)	14
American Rivers & Idaho Rivers United, In re, 372 F.3d 413 (D.C. Cir. 2004)	11
Bennett v. *Spear*, 520 U.S. 154 (1997)	11
Bluewater Network, In re, 235 F.3d 1305 (D.C. Cir. 2000)	11
Cantrell v. *City of Long Beach*, 241 F.3d 674 (9th Cir. 2001)	11
Catron County Bd. of Commerce v. *United States Fish & Wildlife Serv.*, 75 F.3d 1429 (10th Cir. 1996)	11
Chateaugay Corp., In re, 53 F.3d 478 (2d Cir.), cert. denied, 516 U.S. 913 (1995)	18
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971)	11
City of Los Angeles v. *Lyons*, 461 U.S. 95 (1983)	13
Committee to Save the Rio Hondo v. *Lucero*, 102 F.3d 445 (10th Cir. 1996)	12
Douglas County v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 516 U.S. 1042 (1996)	12
Eastern Enterprises v. *Apfel*, 524 U.S. 498 (1998)	12, 18
Federal Election Comm'n v. *Akins*, 524 U.S. 11 (1998)	11
First English Evangelical Lutheran Church v. *County of Los Angeles*, 482 U.S. 304 (1987)	16

Cases—Continued: Page

Florida Audubon Soc'y v. *Bentsen*, 94 F.3d 658 (D.C. Cir. 1996) 12
Forest Guardians v. *Babbitt*, 174 F.3d 1178 (10th Cir. 1999) 11
Heartwood, Inc. v. *United States Forest Serv.*, 230 F.3d 947 (7th Cir. 2000) 12
Hercules, Inc. v. *EPA*, 938 F.2d 276 (D.C. Cir. 1991) 11
Kotteakos v. *United States*, 328 U.S. 750 (1946) 13
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1990) 8, 9, 10, 11, 12, 13, 14
Lujan v. *National Wildlife Fed'n*, 497 U.S. 871 (1990) 12
Marathon Oil Co. v. *Lujan*, 937 F.2d 498 (10th Cir. 1991) 11
National Credit Union Admin. v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998) 11
National Parks Conservation Ass'n v. *Manson*, No. 04-5327, 2005 WL 1540729 (D.C. Cir. July 1, 2005) 11
Neighbors of Cuddy Mountain v. *Alexander*, 303 F.3d 1059 (9th Cir. 2002) 11
North Shore Gas Co. v. *EPA*, 930 F.2d 1239 (7th Cir. 1991) 11
Norton v. *Southern Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004) 12
Preseault v. *ICC*, 494 U.S. 1 (1990) 8, 16, 17
Pritikin v. *Department of Energy*, 254 F.3d 791 (9th Cir. 2001) 14
Pye v. *United States*, 269 F.3d 459 (4th Cir. 2001) 12
Ruckelshaus v. *Monsanto*, 467 U.S. 986 (1984) 17
Simon v. *Eastern Ky. Welfare Rights Org.*, 416 U.S. 26 (1976) 14
Society Hill Towers Owners Ass'n v. *Rendell*, 210 F.3d 168 (3d Cir. 2000) 11

Cases—Continued: Page

US Ecology, Inc. v. *Department of the Interior*, 231 F.3d 20 (D.C. Cir. 2000) 14
United Mine Workers, In re, 190 F.3d 545 (D.C. Cir. 1999) 11
United States v. *Richardson*, 418 U.S. 155 (1974) 11
United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) 17
University Med. Ctr. v. *Shalala*, 173 F.3d 438 (D.C. Cir. 1999) 14
Williamson County Reg'l Planning Comm'n v. *Hamilton Bank*, 473 U.S. 172 (1985) 17
Wisconsin v. *FERC*, 192 F.3d 641 (7th Cir. 1999) 11

Constitution and statutes:

U.S. Const.:
Art. III 8
Amend. V 5, 16
Act of Dec. 23, 1980, Pub. L. No. 96-585, 94 Stat. 3379 4
Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 6
Endangered Species Act, 16 U.S.C. 1531 *et seq.* 6
Fire Island National Seashore Act (FINSA), 16 U.S.C. 459e *et seq.* 2
16 U.S.C. 459e 3
16 U.S.C. 459e-1(e) 18, 19
16 U.S.C. 459e-6(a) 2
16 U.S.C. 459e-7(a) 3
Flood Control Act of 1970, Pub. L. No. 91-611, Tit. II, 84 Stat. 1824 14
§ 221, 84 Stat. 1831 (42 U.S.C. 1962d-5b) 3
River and Harbor Act of 1960, Pub. L. No. 86-645, § 101, 74 Stat. 483 2
Tucker Act, 28 U.S.C. 1491(a)(1) 17

Statutes—Continued: Page

Water Resources Development Act of 1974, Pub. L. No. 93-251, Tit. I, 84 Stat. 12 3
Water Resources Development Act of 1986, Pub. L. No. 99-662, § 103(c)(5), 100 Stat. 4085 5
Water Resources Development Act of 1999, Pub. L. No. 106-53, § 342, 113 Stat. 308 4
Wilderness Act, 16 U.S.C. 1131-1136 4
16 U.S.C. 1131(a) 4
16 U.S.C. 1133(b) 4

In the Supreme Court of the United States

No. 04-1612

NEW YORK COASTAL PARTNERSHIP, INC., ET AL.,
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DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 341 F.3d 112. The opinion of the district court (Pet. App. 10a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 2003. A petition for rehearing was denied on January 14, 2005. On April 8, 2005, Justice Ginsburg granted an application to extend the time within which to file a petition for a writ of certiorari to and including May 31, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners filed suit in federal district court, alleging that the federal respondents' failure to implement adequate erosion-control measures at Fire Island National Seashore violates various federal statutes and effects a taking of petitioners' property. Petitioners sought declaratory and injunctive relief to compel the federal respondents to implement erosion-control measures. The district court dismissed petitioners' claims, Pet. App. 10a-22a, and the court of appeals affirmed, *id.* at 1a-9a.

1. a. In 1960, Congress authorized the United States Army Corps of Engineers (Corps) to undertake a shoreline erosion-control project on the Atlantic shore of Long Island, from Fire Island Inlet to Montauk Point. See River and Harbor Act of 1960, Pub. L. No. 86-645, Tit. I, § 101, 74 Stat. 483. In subsequent legislation, Congress modified the original authorization to require the participation of the Secretary of the Interior in the development of the Fire Island Inlet to Montauk Point project. In 1964, Congress enacted the Fire Island National Seashore Act (FINSA), 16 U.S.C. 459e *et seq.*; see Pet. App. 10a-11a, which established Fire Island as a unit of the National Park System and required the Secretary to administer the Seashore "with the primary aim of preserving the natural resources located there." 16 U.S.C. 459e-6(a). With respect to the shoreline erosion-control project, FINSA provides:

> The authority of the Chief of Engineers, Department of the Army, to undertake or contribute to shore erosion control or beach protection measures on lands within the Fire Island National Seashore shall be exercised in accordance with a plan that is mutually acceptable to the Secretary of the Interior

> and the Secretary of the Army and that is consistent with the purposes of sections 459e to 459e-9 of this title.

16 U.S.C. 459e-7(a). The purposes of FINSA include the preservation of "relatively unspoiled and undeveloped beaches, dunes, and other natural features." 16 U.S.C. 459e.

During the 1970s, Congress enacted two laws that refined pre-existing requirements for non-federal particiation in the Fire Island Inlet to Montauk Point project. In the Flood Control Act of 1970, Pub. L. No. 91-611, Tit. II, § 221, 84 Stat. 1831 (42 U.S.C. 1962d-5b), Congress generally prohibited the commencement of any water resource project constructed or funded by the Corps "until each non-Federal interest has entered into a written agreement with the Secretary of the Army to furnish its required cooperation for the project or the appropriate element of the project, as the case may be." Subsequently, in the Water Resources Development Act of 1974, Pub. L. No. 93-251, § 31, 88 Stat. 21, Congress specifically addressed the Fire Island Inlet to Montauk Point erosion-control project, requiring that

> non-Federal interests shall (1) contribute 30 per centum of the first cost of the project, including the value of lands, easements, and rights-of-way; (2) hold and save the United States free from damages due to the construction works; and (3) maintain and operate the improvements in accordance with regulations prescribed by the Secretary of the Army.

In 1986, Congress increased the required local share of costs to 35%. See Water Resources Development Act of 1986, Pub. L. No. 99- 662, § 103(c)(5), 100 Stat. 4085.[1]

b. The Corps has worked for many years to develop a comprehensive plan for the Fire Island Inlet to Montauk Point project. In 1995, the Corps designed the Fire Island Interim Project (FIIP) to serve as an interim erosion-control measure pending completion of a comprehensive study. See Pet. App. 2a, 11a. The FIIP would have "entail[ed] using sand to construct or enhance various dunes and beaches on the island," at an estimated total cost of $78.8 million. *Id.* at 2a. The FIIP was set forth in a draft decision document and draft environmental impact statement (DEIS) prepared by the Corps in 1999. *Id.* at 11a.

In 1999, while the Corps was developing the draft FIIP, Congress enacted legislation requiring "the Secretary [of the Army], in coordination with the heads of other Federal departments and agencies, to complete all procedures and reviews expeditiously and to adopt and submit to Congress, not later than 120 days after the date of enactment of this Act, a mutually acceptable

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[1] In 1980, Congress designated more than 1300 acres of the Fire Island National Seashore for inclusion in the National Wilderness Preservation System. See Act of Dec. 23, 1980, Pub. L. No. 96-585, 94 Stat. 3379. Under the provisions of the Wilderness Act, 16 U.S.C. 1131-1136, the Fire Island Wilderness is to be managed to "preserv[e] the wilderness character of the area," 16 U.S.C. 1133(b), and is to be administered "for the use and enjoyment of the American people in such a manner as will leave [the area] unimpaired for future use and enjoyment as wilderness," 16 U.S.C. 1131(a). The statute further provides, however, that "[w]ilderness designation shall not preclude the repair of beaches that occur in the wilderness area, in order to prevent the loss of life, flooding and other severe economic and physical damage to the Great South Bay and surrounding areas." § (d), 94 Stat. 3379.

shore erosion plan" for Fire Island. Water Resources Development Act of 1999 (WRDA), Pub. L. No. 106-53, § 342, 113 Stat. 308.[2] In mid-December, the Army informed Congress that it had released the DEIS on the FIIP on December 6, 1999. C.A. App. A-189. The Corps stated that it planned to complete the decision document during the spring of 2000 and that it expected to be "in a position to sign a Record of Decision by July 2000." *Ibid.* Subsequently, however, both the Corps and the Department of the Interior (DOI) decided not to proceed with the FIIP, and the State of New York did not agree to act as the requisite "non-federal interest" for its implementation. Pet. App. 11a.

2. Petitioners filed suit in federal district court, seeking declaratory and injunctive relief. Petitioners named as defendants various federal agencies, the State of New York, and several federal and state government officials. The complaint alleged that the federal respondents, by declining to go forward with the FIIP, had (1) taken petitioners' property, in violation of the Fifth

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[2] Section 342 of the WRDA of 1999 states in its entirety:

> The project for combined beach erosion control and hurricane protection, Fire Island Inlet to Montauk Point, Long Island, New York, authorized by section 101(a) of the River and Harbor Act of 1960 (74 Stat. 483) and modified by the River and Harbor Act of 1962, the Water Resources Development Act of 1974, and the Water Resources Development Act of 1986, is further modified to direct the Secretary, in coordination with the heads of other Federal departments and agencies, to complete all procedures and reviews expeditiously and to adopt and submit to Congress, not later than 120 days after the date of enactment of this Act, a mutually acceptable shore erosion plan for the Fire Island Inlet to Moriches Inlet reach of the project.

113 Stat. 308.

Amendment to the United States Constitution; (2) violated the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*; (3) breached their statutory and fiduciary duties under several other federal statutes; and (4) violated the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See Pet. App. 11a-12a.

The district court granted the federal respondents' motion to dismiss petitioners' complaint. Pet. App. 10a-22a. The district court rejected petitioners' takings claim, explaining that equitable relief on that cause of action was unavailable because petitioners had not invoked the existing statutory mechanisms to obtain just compensation for the alleged takings. *Id.* at 12a-13a. The court dismissed the ESA claim because petitioners had failed to identify any conduct in which the federal respondents had engaged that could serve as the basis for an action under the ESA. *Id.* at 15a-17a. With respect to petitioners' claims that the federal respondents had breached their obligations under other statutes by failing to implement the FIIP, the district court held that petitioners' claims failed because none of the relevant statutes contained a waiver of the United States' sovereign immunity. *Id.* at 17a-18a, 19a-20a. Finally, the court held that petitioners could not bring suit under the APA to compel the federal respondents to develop an erosion-control plan pursuant to the FINSA. *Id.* at 20a-21a. The court concluded that, because "[t]he DOI and the Corps have discretion as to the best manner to effect the FINSA's mission," *id.* at 20a, those agencies' "inaction with regard to the FIIP is precluded from judicial review," *id.* at 21a.

3. The court of appeals affirmed. Pet. App. 1a-9a. The court held that petitioners' claims were subject to dismissal because petitioners lacked standing to sue. *Id.* at 5a. The court assumed, without deciding, that

petitioners' alleged injuries were actual or imminent. *Id.* at 5a n.1.[3] The court concluded, however, that petitioners could not satisfy the redressability requirement of standing doctrine because the court could "only speculate whether the remedy they seek would redress their purported injuries." *Id.* at 5a. The court of appeals explained:

> [Petitioners] identify no statutory authority that would specifically require [the federal respondents] to adopt the FIIP. Despite [petitioners'] optimism, there is no indication that the FIIP would, in fact, remedy Fire Island's erosion problems. Moreover, we recognize that the FIIP is merely an interim plan spanning a five-year period. Accordingly, even were the FIIP successful, at best, it would be terminated and shortly replaced by another program whose chances of success are only speculative at this point in time.

Id. at 5a-6a.

The court of appeals further explained that petitioners' claims under various federal statutes could not go forward because petitioners "identify no duty in any of these statutes that would require [the federal respondents] to act in a manner that would likely redress the injury of which they complain." Pet. App. 6a; see *id.* at 6a-8a. With respect to the WRDA in particular, the court found that, although the statute "contains express provisions for specific action," it does not require "the adoption of any specific plan" or a "*successful* shore

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[3] Petitioners' complaint alleged that groins and stabilization projects previously installed by the federal government had caused or contributed to Fire Island's erosion problems. See C.A. App. A-50 to A-52. Whether that causal link exists is a matter of dispute. See Affidavit of James T.B. Tripp ¶ 11 (Nov. 26, 2001).

erosion plan," and the plan adopted by the relevant federal agencies "need not be acceptable to [petitioners]." *Id.* at 8a. For that reason, the court concluded, the federal respondents' "compliance with the [WRDA] would not necessarily make it likely that any plan adopted and submitted to Congress would remedy Fire Island's shore erosion problem." *Ibid.*

With respect to petitioners' claim that the federal respondents' "failure to prevent shore erosion on Fire Island constitutes a de facto taking," the court of appeals recognized that "the Takings Clause prohibits the government from seizing private property without providing just compensation," and the court left open the possibility that petitioners might be able to obtain a compensation remedy. Pet. App. 9a (internal quotation marks omitted). The court held, however, that petitioners' current takings claims could not go forward, both because petitioners "do not have standing to seek an equitable remedy in this situation," and because petitioners had failed to establish that their potential remedy at law was inadequate. *Ibid.* With respect to the adequacy of petitioners' remedy at law, the court noted that "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." *Id.* at 9a n.3 (quoting *Preseault* v. *ICC*, 494 U.S. 1, 11 (1990)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. In *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), this Court explained that an Article III case or

controversy exists only if (a) the plaintiff "ha[s] suffered an 'injury in fact,'" (b) that injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court," and (c) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560-561 (citations, brackets, ellipses, and internal quotation marks omitted). Petitioners do not contend that they can establish standing (and, in particular, redressability) under that framework. Rather, petitioners argue (Pet. 13) that their alleged injury is a "procedural" harm, and that the redressability inquiry is therefore governed by a less demanding standard.

Petitioners' contention lacks merit for three reasons. First, the federal respondents' failure to adopt a "plan" to guide their overall Fire Island erosion-control efforts is quite different from the type of procedural violation as to which this Court has held a relaxed standard of redressability to be applicable. Second, even in cases involving alleged violations of procedural requirements, a plaintiff cannot establish standing if, as in this case, it is purely speculative whether the relief sought will remedy or prevent the actual or threatened injury. Finally, petitioners cannot satisfy the redressability requirement in this case because the implementation of any erosion-control plan for Fire Island under the WRDA is contingent on the independent action of the State of New York, and petitioners cannot show that the State will agree to help fund and implement such a plan.

a. The court of appeals assumed, without deciding, that petitioners had sufficiently alleged an actual or imminent injury. Pet. App. 5a n.1. The court held, however, that petitioners could not show that the

alleged injury would be redressed by a favorable judicial ruling because the court could only "speculate" whether an erosion-control plan adopted by the federal respondents would remedy petitioners' harm. *Id.* at 5a. The court found in particular that "there [wa]s no indication that the FIIP would, in fact, remedy Fire Island's erosion problems." *Ibid.* The court further observed that, even if the federal respondents adopted and submitted to Congress an erosion-control plan that was acceptable to the federal agencies involved, the WRDA did not require the adoption of any specific plan, or of a plan that would be successful or acceptable to petitioners. *Id.* at 8a.[4]

b. This Court has held that a "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Defenders of Wildlife*, 504 U.S. at 572 n.7. As an example of that principle, the Court stated that "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with

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[4] Indeed, petitioners' complaint alleged that the erosion-control measures purportedly favored by the Department of the Interior—*i.e.*, the acquisition and removal of beachfront properties rather than the structural beach nourishment projects proposed by the Corps (C.A. App. A-57 to A-58)—are "contrary to the intent of Congress and to sound engineering principles" and would not "mitigate the effects of the accelerated erosion and physical invasions caused by the Defendants prior projects." *Id.* at A-57. Thus, petitioners' own allegations demonstrate that it is highly speculative whether the adoption of a shoreline erosion-control plan mutually acceptable to the Corps and the DOI would redress petitioners' harm.

any certainty that the statement will cause the license to be withheld or altered." *Ibid.* The Court in *Defenders of Wildlife* described "the archetypal procedural injury: an agency's failure to prepare a statutorily required environmental impact statement before taking action with potential adverse consequences to the environment." *National Parks Conservation Ass'n* v. *Manson*, No. 04-5327, 2005 WL 1540792, at *3 (D.C. Cir. July 1, 2005) (citing *Defenders of Wildlife*, 504 U.S. at 752 n.7). Almost all of the procedural standing cases on which petitioners rely involved similar challenges to an agency's failure properly to complete an environmental review in accordance with legal requirements.[5] See *Catron County Bd. of Comm'rs* v. *United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1433 (10th Cir. 1996); *Society Hill Towers Owners' Ass'n* v. *Rendell*, 210 F.3d 168, 172-173 (3d Cir. 2000); *Cantrell* v. *City of Long Beach*, 241 F.3d 674, 676-677 (9th Cir.

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[5] Many of the cases on which petitioners rely do not address the question of standing. Those include *In re Bluewater Network*, 234 F.3d 1305 (D.C. Cir. 2000); *Forest Guardians* v. *Babbitt*, 174 F.3d 1178 (10th Cir. 1999); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971); *In re American Rivers & Idaho Rivers United*, 372 F.3d 413 (D.C. Cir. 2004); *Neighbors of Cuddy Mountain* v. *Alexander*, 303 F.3d 1059 (9th Cir. 2002); *In re United Mine Workers*, 190 F.3d 545 (D.C. Cir. 1999); *Marathon Oil Co.* v. *Lujan*, 937 F.2d 498 (10th Cir 1991); *Hercules, Inc.* v. *EPA*, 938 F.2d 276 (D.C. Cir. 1991). Others that address standing do not involve allegations of procedural injury. See *Federal Election Comm'n* v. *Akins*, 524 U.S. 11 (1998) (informational standing); *Bennett* v. *Spear*, 520 U.S. 154 (1997); *United States* v. *Richardson*, 418 U.S. 166 (1974) (taxpayer standing); *National Credit Union Admin.* v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998) (prudential standing); *Wisconsin* v. *FERC*, 192 F.3d 642 (7th Cir. 1999); *North Shore Gas Co.* v. *EPA*, 930 F.2d 1239 (7th Cir. 1991) (no discussion of procedural standing).

2001); *Committee to Save the Rio Hondo* v. *Lucero*, 102 F.3d 445, 448 (10th Cir. 1996); *Douglas County* v. *Babbitt*, 48 F.3d 1495, 1497-1499 (9th Cir. 1995), cert. denied, 516 U.S. 1042 (1996); *Florida Audubon Soc'y* v. *Bentsen*, 94 F.3d 658, 662 (D.C. Cir 1996); *Heartwood, Inc.* v. *United States Forest Serv.*, 230 F.3d 947, 950-951 (7th Cir. 2000); *Pye* v. *United States*, 269 F.3d 459, 462-464 (4th Cir. 2001).

The hypothetical situation described in *Defenders of Wildlife* involved a discrete on-the-ground action—construction of a federally licensed dam. See 504 U.S. at 572 n.7. The Court stated that, so long as a plaintiff can demonstrate a likelihood of injury from consummation of the relevant project, he can challenge the proposed action on the ground that the agency's decision-making processes were legally defective, even if he "cannot establish with any certainty" that use of appropriate procedures would have produced a different outcome. *Ibid.* Petitioners' complaint, by contrast, did not focus on specific on-the-ground agency actions, but instead alleged in general terms that the federal respondents had failed to take adequate steps to fulfill their statutory obligations to protect the Fire Island coastline. See, *e.g.*, C.A. App. A-70.

In that respect, petitioners' suit resembles the generalized challenges to overall agency programs that this Court has held to be beyond the scope of judicial authority. See *Norton* v. *Southern Utah Wilderness Alliance*, 124 S. Ct. 2373, 2378-2384 (2004) (*SUWA*); *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990). Although petitioners characterize their suit as "an effort to compel 'discrete agency action that [Respondents are] required to take,'" Pet. 12 (quoting *SUWA*, 124 S. Ct. at 2379), the "discrete agency action" to which they refer is not a concrete erosion-control

measure, but rather the adoption of a "plan" pursuant to the WRDA. The gravamen of petitioners' claim is that the adoption of such a plan would alter the federal respondents' overall erosion-control efforts in a way that would be beneficial to petitioners' interests. Nothing in *Defenders of Wildlife* suggests that a plaintiff may bring a claim of this nature without satisfying generally-applicable standards of redressability.

c. Petitioners would not have standing to sue in this case even if their claims were subject to the relaxed redressability requirement that, under *Defenders of Wildlife*, is applicable to claims of "procedural" irregularity. A plaintiff who alleges a procedural violation can assert his claim "without satisfying *all* the normal standards for redressability and immediacy," and he need not "establish with any certainty" that compliance with the relevant procedural requirements would have produced a more favorable outcome. *Defenders of Wildlife*, 504 U.S. at 572 n.7 (emphasis added); cf. *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946) (non-constitutional error provides basis for reversal in federal criminal case if appellate court concludes that error affected the outcome or is left in "grave doubt" as to whether such an effect occurred). Nothing in *Defenders of Wildlife* suggests, however, that the redressability requirement is eliminated altogether when the plaintiff alleges a procedural violation. Absent some reasonable prospect that a favorable judicial ruling will prevent or remedy his alleged injury, a plaintiff would lack the "personal stake in the outcome" of the suit, *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)), that Article III demands.

In the instant case, the court of appeals noted petitioners' failure to identify any provision of law

requiring the federal respondents to take measures that would "likely" address petitioners' asserted harms. See Pet. App. 6a, 7a. The court also stated, however, that it could "only speculate whether the remedy [petitioners] seek would redress their purported injuries" because "there is no indication that the FIIP would, in fact, remedy Fire Island's erosion problems." *Id.* at 5a. There is consequently no reason to suppose that the outcome of this case would have been different if the court of appeals had applied the less demanding standard of redressability applicable to claims of procedural infirmity.

d. When a plaintiff alleges that he has been injured by the unlawful conduct of the federal government, and the effectiveness of a judicial order in alleviating the plaintiff's harm depends on the voluntary choices of non-federal actors, "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to * * * permit redressability of injury." *Defenders of Wildlife*, 504 U.S. at 562; see, *e.g.*, *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976); *Allen* v. *Wright*, 468 U.S. 737, 757-758 (1984); *Pritikin* v. *Department of Energy*, 254 F.3d 791, 799-801 (9th Cir. 2001); *US Ecology, Inc.* v. *Department of the Interior*, 231 F.3d 20, 24-25 (D.C. Cir. 2000); *University Med. Ctr.* v. *Shalala*, 173 F.3d 438, 440-442 (D.C. Cir. 1999). Petitioners cannot satisfy that requirement.

Under the Flood Control Act of 1970, Pub. L. No. 91-611, Tit. II, 84 Stat. 1824, and the Water Resources Development Act of 1974, Pub. L. No. 93-251, Tit. I, 84 Stat. 12, implementation of any plan developed by the federal respondents cannot proceed until a non-federal party agrees to fund at least 35% of the project, to maintain and operate any improvements, and to enter

into a written agreement to comply with those requirements. See pp. 3-4, *supra*. The allegations of petitioners' own complaint suggest that the State of New York is unlikely to agree to participate in the FIIP that petitioners seek to have adopted. Petitioners' complaint alleged that the State's Department of Environmental Conservation and Department of State "acted individually and in concert [with the United States Department of the Interior] to prevent bringing the review process [for the FIIP] to closure." C.A. App. A-57. The complaint further alleged that the "State agency defendants have continued to delay responses [to the draft FIIP]," primarily because the Department of State "supports the DOI's objective of removing the over 300 houses in the dune areas before any breach [sic] nourishment takes place." *Id.* at A-60. The complaint also alleged that the state agencies have "frustrated the Corps' efforts to bring the FIIP to fruition," including by refusing to submit formal comments on the FIIP DEIS. *Id.* at A-60 to A-61. Those allegations are inconsistent with any contention that New York officials are likely to exercise their own discretionary authority in a manner that would permit redress of petitioners' injuries through a judicial order directed at the federal respondents.[6]

2. Petitioners contend that this Court should grant review to "clarify that district courts are not cate-

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[6] Although petitioners' complaint sought an injunction compelling New York officials to cooperate with the federal respondents (see C.A. App. A-73), petitioners' claims against the state defendants were dismissed by the district court, and that ruling was affirmed by the court of appeals. In this Court, petitioners do not seek review of any question concerning the discretion of state officials to decline to approve or participate in a WRDA plan deemed mutually acceptable by the relevant federal agencies.

gorically barred from entertaining suits for declaratory or injunctive relief under the Takings Clause." Pet. 26 (capitalization omitted). The question whether such suits are "categorically barred" is not presented in this case, and the court of appeals correctly held that petitioners' takings claim could not go forward.

a. The court of appeals explained that petitioners' takings claim was properly dismissed in part because petitioners "do not have standing to seek an equitable remedy in this situation." Pet. App. 9a. That holding is correct for the reasons stated above. See pp. 9-15, *supra*. Regardless of the source of law on which a plaintiff's claim is based, a federal court may entertain a suit for equitable relief only if the plaintiff can establish a sufficient probability that a favorable judicial ruling would redress its injury. That limitation on the federal judicial power provides an adequate and independent ground for dismissal of petitioners' takings claim.

b. As an additional basis for affirming the dismissal of petitioners' takings claim, the court of appeals stated that petitioners had failed to demonstrate the inadequacy of their remedy at law, Pet. App. 9a, and it explained that "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act," *id.* at 9a n.3 (quoting *Preseault* v. *ICC*, 494 U.S. 1, 11 (1990)). The court of appeals did not purport to announce a categorical bar to equitable relief in takings cases, but simply (and accurately) described the general rule articulated in a number of this Court's decisions. Because the Just Compensation Clause does not "limit the governmental interference with property rights per se, but rather * * * secure[s] compensation in the event of otherwise proper interference amounting to a taking," *First English Evangelical Lutheran Church* v.

County of Los Angeles, 482 U.S. 304, 315 (1987) (emphasis omitted), the Clause is not violated unless the government takes private property while refusing to compensate the owner. For that reason, "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." *Ruckelshaus* v. *Monsanto*, 467 U.S. 986, 1016 (1984) (footnote omitted); see *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-128 (1985). "If the government has provided an adequate process for obtaining compensation, and if resort to that process yield[s] just compensation, then the property owner has no claim against the Government for a taking." *Preseault*, 494 U.S. at 11 (quoting *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194-195 (1985)).

A plaintiff who alleges a taking of property by the United States may generally seek just compensation under the Tucker Act, which confers jurisdiction on the Court of Federal Claims "to render judgment upon any claim against the United States founded * * * upon the Constitution." 28 U.S.C. 1491(a)(1); see *Monsanto*, 467 U.S. at 1016 & n.20. Thus, even when federal agency action effects a taking of property, that action cannot be deemed unconstitutional, and equitable relief is inappropriate, unless the plaintiff can demonstrate that Congress has withdrawn the Tucker Act remedy. See *Preseault*, 494 U.S. at 11-12. This Court has consistently presumed, moreover, that the Tucker Act remedy remains available in takings cases unless Congress has clearly manifested its intent to withdraw that remedy for a particular category of claims. See *id.* at 12. The court of appeals' holding that petitioners had

failed to establish the inadequacy of their legal remedies is thus fully consistent with this Court's precedents.[7]

c. Petitioners contend (Pet. 29) that injunctive relief is appropriate because the "core" of their takings claim "is that the taking is *unauthorized*—and indeed forbidden by—Congress." Petitioners rely (Pet. 29) on a provision of the Fire Island National Seashore Act, 16 U.S.C. 459e-1(e), which states that the Secretary of the Interior "shall not acquire any privately owned improved property or interests therein within the boundaries of the seashore * * * without the consent of the owners." But while petitioners' complaint alleged that the federal respondents' conduct has caused damage to petitioners' oceanfront tracts, thereby effecting "*de facto* takings of [petitioners'] properties" (C.A. App. A-64), proof of those allegations

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[7] Petitioners' reliance (Pet. 27-28) on the plurality opinion in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), is misplaced. The plurality in *Eastern Enterprises* acknowledged the general rule that "the availability of a Tucker Act remedy renders premature any takings claim in federal district court." *Id.* at 521. The Court concluded, however, that Congress could not have intended the Tucker Act remedy to apply in the particular circumstances of that case, where the alleged taking resulted from a statute requiring the plaintiffs to make a stream of payments to another party. Rather, the Court found that the "'presumption of Tucker Act availability must be reversed where the challenged statute, rather than burdening real or physical property, requires a direct transfer of funds' mandated by the government." *Ibid.* (quoting *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir.), cert. denied, 516 U.S. 913 (1995)). Because petitioners' takings claim is based not on a mandate to make a direct transfer of funds, but on the burden that the federal respondents have allegedly imposed on their "beachfront property" (Pet. 26), the reasoning of *Eastern Enterprises* does not apply here.

would not establish that the Secretary had "acquire[d]" the relevant lands within the meaning of 16 U.S.C. 459e-1(e). Petitioners' complaint did not allege a violation of Section 459e-1(e), and neither the district court nor the court of appeals discussed that provision. Petitioners' statutory claim therefore does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

NEW YORK COASTAL PARTNERSHIP, INC., MAURICE BARBASH, JOHN W. LUND, SANDY ASSOCIATES, EUGENE D. FALK, DAVID ASH, JEROME LEVY, M.D., WELLS NEWELL, JOYCE SEGAL, THE HARBOUR CLUB, MODICA ASSOCIATES OF NEW YORK 122, LLC, FIRE ISLAND FERRIES, INC., JMA INDUSTRIES, INC., DAVID A. SLOANE, HARRY PARITSKY, WHITE CAP FISH COMPANY, INC., LEONARD WEINSTEIN, RICHARD STAFFORD, PAMELA JOHNSON, SAYVILLE FERRIES SERVICE, INC., DAVIS PARK FERRY CO., INC., ROBERT JOHNSON, DUNEWOOD PROPERTY OWNERS' ASSOCIATION, FAIR HARBOR FIRE DISTRICT, and JAMES GROVER, JR.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, GALE NORTON, SECRETARY OF INTERIOR, MICHAEL T. REYNOLDS, SUPERINTENDENT OF THE FIRE ISLAND NATIONAL SEASHORE, UNITED STATES ARMY CORPS OF ENGINEERS, FRANCIS J. HARVEY, SECRETARY OF THE ARMY, CARL A. STROCK, CHIEF OF ENGINEERS, U.S. ARMY CORPS OF ENGINEERS, RANDY L. DANIELS, SECRETARY, NEW YORK STATE DEPARTMENT OF STATE, and DENISE M. SHEEHAN, ACTING COMMISSIONER, STATE OF NEW YORK, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Second Circuit

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TABLE OF CONTENTS

Table of Authorities ii

Argument 1

Conclusion 10

TABLE OF AUTHORITIES

CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 2

AFGE, Local 2119 v. Cohen, 171 F.3d 463 (7th Cir. 1999) 4

Applegate v. United States, 25 F.3d 1579 (Fed. Cir. 1994) 8

Babbitt v. Youpee, 519 U.S. 234 (1997) 9

Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667 (1986) 2

Committee to Save the Rio Hondo v. Lucero, 102 F. 2d 445 (10th Cir. 1996) 3

Devito v. U.S., 12 F. Supp. 2d 269 (E.D.N.Y. 1998) 9

Dolan v. City of Tigard, 512 U.S. 374 (1994) 8

Drakes Bay Land Co. v. United States, 459 F.2d 504 (Ct.Cl. 1972) 10

Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. 59 (1978) 8

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 1,8

Electric Power Supply Ass'n v. FERC, 391 F.3d 1255 (D.C. Cir. 2004) 4

FEC v. Akins, 525 U.S. 11 (1998) 6

Flast v. Cohen, 392 U.S. 83 (1968) 6

Fla. Audubon Soc'y v. Benson, 94 F.3d 658 (1996) 3

Hodel v. Irving, 481 U.S. 704 (1987) 9

Lingle v. Chevron USA Inc., 125 S. Ct. 2074 (2005) 9

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) ..... *passim*

New York v. United States, 505 U.S. 144 (1992) 7

Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373 (2004) ..... *passim*

Pye v. United States, 269 F.3d 459 (4th Cir. 2001) 4

Robertson v. Methow Valley Citizen Council, 490 U.S. 332 (1989) 6

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) 5,6

Society Hill Towers Owners' Ass'n v. Rendell, 210 F.3d 168 (3d Cir. 2000) 4

United States v. Dickinson, 331 U.S. 745 (1947) 10

United States v. James, 478 U.S. 597 (1986) 9

STATUTES AND LEGISLATIVE MATERIALS

Administrative Procedure Act,
5 U.S.C. 704 6
5 U.S.C. 706(1) 6

Fire Island National Seashore Act,
16 U.S.C. 459e-1(e) 9

Flood Control Act,
33 U.S.C. 702c 9

Pub. L. 106-53 (Water Resources
Development Act of 1999), Sec. 342 ..... *passim*

H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946) 2

OTHER AUTHORITIES

Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144 (1996) 10

Lehner, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627 (1983) 2

Zaller, *The Case for Strict Statutory Construction of Mandatory Agency Deadlines under Section 706(1)*, 42 WM. & MARY L. REV. 1545 (2001) 2

In the decision below, the Second Circuit held that the federal courts are without power to entertain claims (1) to compel agency compliance with specific statutory commands, brought, under the Administrative Procedure Act, by the very citizens the statute was intended to benefit; (2) for equitable relief under the Takings Clause, in circumstances where the remedy of monetary compensation after acquisition is not adequate, congressionally intended, or constitutionally "just."

As explained in the petition, these rulings reflect the widespread uncertainty, confusion, and conflict in the lower federal courts concerning (1) the nature of the modified Article III standing test for "procedural rights" cases, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 & nn. 7, 8 (1992), and (2) the circumstances under which the availability of a post-deprivation monetary remedy should preclude district court jurisdiction over Takings claims.

Respondents' Brief in Opposition does not seriously dispute that these questions have divided the lower courts (and this Court, see *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998)), nor does it deny that they are important questions of federal law. Rather, Respondents largely argue that the questions were resolved correctly below. That would not be a strong ground for denying review in any event, and, as we show, the Second Circuit's decision was seriously wrong on its merits.

1. The Brief in Opposition is remarkably reticent about the violation of the clear, specific, and mandatory congressional command that is at the heart of this case. Section 342 of the Water Resources Development Act of 1999, Pub. L. 106-53, "direct[s]" the federal Respondents to "complete all procedures and reviews expeditiously and to adopt and submit to Congress, not later than 120 days after enactment of this Act, a mutually acceptable shore erosion plan" for Fire Island. Its enactment was a direct response to a pattern of bureaucratic recalcitrance (see Pet. 3-8), in the face of serious threats to those (including Petitioners) who reside on and visit Fire Island and those on

Long Island's South Shore who depend on it for protection against coastal flooding.

Respondents do not (and could not) deny that the agencies failed to adopt a shore erosion plan as required by Section 342, but neither do they acknowledge or try to explain the agencies' default. Rather, the brief makes a single, passing reference to the agencies' "deci[sion] not to proceed with the FIIP" (Opp. 5), the oft-delayed erosion-control undertaking whose non-completion had prompted Congress to command the agencies to take action, once and for all, by a date certain.

a. As we demonstrated (Pet. 25-26), federal courts have always been open to parties aggrieved by an agency's failure to perform actions "specifically and unequivocally commanded" by Congress, *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373, 2379 (2004) ("*SUWA*"). Under our constitutional system, agencies are not free to "decide," like Bartleby the Scrivener, not to comply with the law: "'The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases.'" *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 671 (1986) (quoting H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946)).

Indeed, judicial review of agency action exists to address just this kind of disregard for the duly enacted will of Congress. The central purpose of the APA review provisions was "to give the courts a tool with which they could force the agency to act according to congressional will," Zaller, *The Case for Strict Statutory Construction of Mandatory Agency Deadlines under Section 706(1)*, 42 WM. & MARY L. REV. 1545, 1549 (2001); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (noting that "basic presumption of judicial review" was "reinforced" by the APA); Lehner, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627, 689 (1983) ("Judicial review of agency nonimplementation of a statute is both necessary and proper to give effect to the congressional intent and to assure the legitimacy of the administrative system").

Indeed, even when the default is the relatively venial one of a delay in meeting a statutory deadline, rather than, as here, an outright refusal to execute a mandatory duty, courts have not treated agency officials' claims that a statute might prove ineffective at achieving its ultimate policy goals as a reason to deny aggrieved individuals standing to enforce it. Such an argument, accepted below, creates an obvious moral hazard for agencies facing inconvenient or unwelcome statutory mandates.

Defenders of Wildlife recognized that "redressability" objections of this sort do not bar APA suits alleging noncompliance with procedural mandates designed to protect plaintiffs' concrete interests, 504 U.S. at 572-73 & nn. 7, 8 – and that at the motion to dismiss stage, plaintiffs' submissions on standing are entitled to the benefit of all reasonable inferences and the assumption of specific support for general allegations, *id.* at 561.

2. As our petition demonstrated, the Second Circuit's reasoning implicates a conflict among the courts of appeals as to the nature of the Article III standing analysis under *Defenders of Wildlife* footnotes. Respondents do not dispute this division of authority, and for good reason. See, *e.g.*, *Committee to Save the Rio Hondo v. Lucero*, 102 F. 2d 445, 451 (10th Cir. 1996) (expressly rejecting, as overly restrictive, the redressability standard embraced by the D.C. Circuit in a sharply divided en banc decision in *Fla. Audubon Soc'y v. Benson*, 94 F.3d 658, 667 (1996)); Pet. 20-24.

Rather, Respondents (Opp. 11-14) suggest that the rules recognized in *Defenders of Wildlife* might apply only in "environmental review" statutes, and that Petitioners' likelihood of obtaining redress from a judicial ordering compliance with Section 342 is somehow more "speculative" than in the hypothetical NEPA case discussed in *Defenders of Wildlife*.

a. There is nothing in this Court's discussion in *Defenders of Wildlife* that supports a subject-matter limitation to

procedural standing, and the decisions of the courts of appeals are to the contrary.[1] As we showed (Pet. 14-24), the Second Circuit's decision implicates the same problem raised in those cases, namely, whether the possibility that an agency, after carrying out procedures mandated by Congress to safeguard interests that plaintiffs share, will reach a decision that does not remedy a plaintiff's injury defeats jurisdiction over an APA suit to compel performance of the legislated procedures. But to the extent the discussion in *Defenders of Wildlife* has left uncertainty as to when the less demanding standard should govern, that would be reason for *granting* review here.

b. If Section 342 differs from the hypothetical "procedural violation" standing addressed in *Defenders*, it differs only in ways that make the case for standing *stronger* here.

i. First, this case arises on a motion to dismiss Petitioners' complaint. Thus, even if it were true that the complaint merely "alleged in general terms that the federal Respondents had failed to take adequate steps to fulfill their statutory obligations to protect the Fire Island coastline" (Opp. 13) – and it is not – Petitioners would be entitled to the benefit of every reasonable inference. See *Defenders of Wildlife,* 504 U.S. at 561.

ii. Second, and consistent with their general disregard for the provision's text and history as a response to specific administrative failures, Respondents overlook the fact that Section 342 itself required the agencies to finish "*all procedures and reviews expeditiously*" – a reference that, read in the context of unfolding administrative proceedings concerning Fire Island's erosion problems, plainly included the

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[1] See, *e.g.*, *Pye v. United States*, 269 F.3d 459, 468 (4th Cir. 2001) (National Historic Preservation Act); *Society Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 176-77 (3d Cir. 2000) (same); *AFGE, Local 2119 v. Cohen*, 171 F.3d 463, 466-67 (7th Cir. 1999) (statutorily mandated cost comparison for reduction in military force); *Electric Power Supply Ass'n v. FERC*, 391 F.3d 1255, 1262 (D.C. Cir. 2004) (statutory prohibition on *ex parte* communications).

then nearly complete NEPA review in connection with the FIIP. If, as Respondents appear to acknowledge, generic procedural obligations like those imposed by NEPA are enforceable by citizen plaintiffs with a concrete interest in the affected land (an interest Respondents appear to concede to Petitioners here, Opp. 9), then a statute mandating expeditious completion of those reviews is *a fortiori* enforceable by those plaintiffs.

iii. Section 342 differs from NEPA and other generic procedural statutes in another way that cuts strongly in Petitioners' favor. It is a narrowly targeted provision that was intended to remedy a specific problem ("shore erosion") involving a particular geographic area (the stretch of seashore "between Fire Island Inlet and Moriches Inlet") and that demands from the agencies a specific response ("a shore erosion plan"). Section 342's specificity readily differentiates this suit from the "generalized challenges to overall agency programs" that Respondents, surprisingly (Opp. 12), claim it to resemble.[2] Doctrine aside, it strains common sense to deny a person threatened with having his land washed away standing to enforce a congressional "direction" to federal officials to adopt a "shore erosion plan" targeting the threatened area.

Respondents do not dispute that Petitioners were the proponents and intended beneficiaries of Section 342, nor that Petitioners, of all people, have a concrete and particularized interest in the agencies' "deci[sion]" not to comply with the provision. And they do not identify any *other* party who would have standing to challenge the agency's wholesale disregard for

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[2] See *SUWA*, 124 S. Ct. at 2380-81 (holding unreviewable plaintiffs' claim that agencies had violated mandate to "'manage [Wilderness Study Areas] * * * so as not to impair the[ir] suitability for preservation as wilderness'" 43 U.S.C. 1782(c)). Notably, *SUWA* did not hold that plaintiffs lacked *standing*.

Section 342.[3]

c. Section 342 itself should suffice to defeat the objection that it remains "purely speculative" (Opp. 9) whether an order requiring compliance by the agencies would address Petitioners' injury. The statute reflects a determination *by Congress* that the "adoption" of a "shore erosion plan" developed by the Corps of Engineers – one elaborate exemplar of which was before Congress in August 1999 in the form of the then nearly complete FIIP, see Pet. at 20 n.9 – would serve as at least a partial remedy for the ongoing threat to Fire Island. It is not "speculative" to conclude, following Congress, that a "shore erosion plan" developed by the Nation's foremost engineering agency will benefit those threatened by *shore erosion* in the very area covered by the plan.

Respondents do not cite any authority for the proposition that *Defenders of Wildlife* imposed a "reasonable prospect" of ultimate redress requirement (p.13) in procedural rights cases; as the petition explains (pp. 21-22), several courts of appeals have held that the probability that injury will or will not ultimately be averted has no place in the analysis. And even without benefit of the indulgent standards for Rule 12(b)(6) motions, the likelihood of concrete relief for Petitioners is at least as great as in the typical NEPA case, where there is always the possibility that the agency will decide to proceed with the project after environmental review is complete, without adopting any of the mitigation measures sought by the project opponents, see *Robertson v. Methow Valley Citizen Council,*

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[3] There are, to be sure, legal obligations that no party has standing to enforce, see *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 227 (1974), but this case does not involve a "generalized grievance" common to all or many citizens, *Flast v. Cohen,* 392 U.S. 83, 106 (1968), and it is unrealistic to expect the "political processes," *Reservists Committee,* 418 U.S. at 227, to stand as the exclusive check on administrative intransigence of this kind. On the contrary, Congress expressly authorized federal courts to compel agencies to take action, at the behest of aggrieved parties like Petitioners. See 5 U.S.C. 702, 706(1).

490 U.S. 332, 350-51 (1989). Indeed, as noted in *FEC v. Akins*, 525 U.S. 11, 25 (1998), the possibility that compliance with procedures may not yield concrete benefits in the end – present in many suits for review of administrative action (or inaction) – does not defeat plaintiffs' standing to enforce the procedures.

d. Nor is there the least merit in Respondents' alternative suggestion (Opp. 14-15) that federal jurisdiction was defeated by the possibility that the State of New York might not agree to implement the "shore protection plan" mandated by Section 342 (a suggestion that again requires them to construe the factual allegations *against* plaintiffs at the pleading stage). Petitioners sought an order requiring the federal agencies to adhere to *their* specific statutory duties under Section 342 (which nowhere mentions the State), duties Congress obviously believed would improve real-world conditions on Fire Island.

An order requiring the agencies to comply would have ensured that a plan was in place. While that plan would not be self-executing, its adoption (after years of delays) would have cleared the single greatest obstacle (federal agency delay and indecision) to addressing the erosion problem. Potential future difficulties with the "implementation" of the plan (Opp. 14) do not defeat Petitioners' standing to enforce the Congress's mandate that the plan be "adopt[ed]."[4]

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[4] Although Congress plainly was aware of the State's role in ultimate implementation, Section 342 nowhere suggests that the agencies could or should await State assent before adopting the expedited plan therein mandated – let alone that "failure" to obtain advance sign-off from New York would be a legitimate basis for ignoring the statutory command.

Respondents' argument heralds a bureaucratic revival of Alphonse and Gaston. In the district court, the State repeatedly protested that "[t]he FIIP is a Corps project" and that the State's obligations under various statutes had "not yet been triggered" because the federal government had not completed any plan. State Defendants' Mem. In Support of Mtn to Dismiss at 5, 6, 7 (Dec. 14, 2001) (E.D.N.Y No. 01-cv-2777). See *New York v. United States*, 505 U.S. 144, 168 (1992) (discussing the interest in preserving the "accountability of both federal and state officials").

2. As demonstrated in the Petition (pp. 26-30), the Second Circuit's dismissal of Petitioners' takings claim was erroneous, and reflective of continuing uncertainty in the lower courts (and this Court's decisions) concerning when the district courts may entertain claims arising under the Takings Clause.

a. Respondents' first submission (Opp. 16) with respect to Petitioners' takings claim, that it fails on standing grounds, for lack of *redressability*, is puzzling. The complaint (JA64) alleged that Respondents were managing federal resources so as to cause Petitioners' land to be eroded by the sea, see, *e.g.*, *Applegate v. United States*, 25 F.3d 1579 (Fed. Cir. 1994), praying that the district court "enjoin [Respondents] from allowing the de facto takings of [Petitioners'] property to continue," and enjoin "any action" inconsistent with the statutory exemption from condemnation (JA73). The requested injunction, based on the Takings Clause and potentially requiring Respondents to take immediate action against beach erosion, would *directly* redress the injury.

b. Contrary to Respondents' submission, and despite certain broad language in some of its opinions, this Court has not confined district court jurisdiction to takings challenges to statutes involving the "direct transfer of funds," Opp. 18 n.7 (citing *Eastern Enterprises*, 524 U.S. at 521 (plurality opinion of O'Connor, J.)), nor made congressional intent to *withdraw* Court of Federal Claims jurisdiction the touchstone for the availability of equitable relief (Opp.17).

The plurality in *Eastern Enterprises* did not assume that the coal company Petitioners *could not have* filed suit for post-deprivation compensation, but rather that Congress did not *require* them to pursue that remedy. Consistent with that reasoning – and with the principle that the Takings Clause is not a "poor relation" under the Bill of Rights, *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) – the Court has repeatedly entertained suits (and affirmed injunctive relief) in a range of cases, by no means confined to "money-transfer" statutes,

alleging that post-deprivation compensation would be inadequate or unjust, *Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 71 n.15 (1978); that the appropriation was not for a "public use," see *Lingle v. Chevron USA Inc.*, 125 S. Ct. 2074, 2084 (2005) ("No amount of compensation can authorize such action"); or that it was not duly authorized, see Pet. 29-30 & n.18. See also *Hodel v. Irving*, 481 U.S. 704, 715 (1987); *Babbitt v. Youpee*, 519 U.S. 234, 242 (1997). The common denominator of these decisions was not the character of the governmental action challenged (*e.g.*, "fund-transfer" statutes), but rather the nature of the *plaintiffs' claims*: *i.e.*, whether they were of a type for which Congress intended to make the Tucker Act remedy *exclusive*.

As explained in the petition (pp. 27-29), the claim in this case falls squarely within the principle established by these precedents. In creating the Fire Island National Seashore, Congress gave property owners explicit statutory protection against having their land taken by the government, even with compensation. See 16 U.S.C. 459e-1(e) (providing that DOI "shall not" acquire of privately owned, improved property "without the consent of the owners").[5] That provision plainly establishes that taking of this property is *not* authorized and reflects a legislative determination that post-appropriation monetary relief under the Tucker Act (even if available) would be per se "unjust" compensation for these property interests.[6]

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[5] Contrary to the Government's contention (Opp. 19), the complaint *did* rely upon the statutory bar on unconsented acquisition of private property, albeit misciting the U.S. Code section in which it appears. See JA73 (requesting order prohibiting "the DOI from taking any action which would condemn improved properties which are exempt from condemnation pursuant to 16 U.S.C. Section 455-e-7(a)) [sic]").

[6] There are also reasons to question the adequacy of any Tucker Act remedy. Any claim for compensation might well face a defense under the Flood Control Act, 33 U.S.C. 702c, which the United States has cited as a bar to actions by property owners seeking relief for shore erosion. See *Devito v. U.S.*, 12 F. Supp. 2d 269, 273 (E.D.N.Y. 1998); *United States v. James*,

c. Seeking to avoid the settled principle (see Pet. 29-30) that challenges to takings effected *without authorization* are not relegated to the Court of Federal Claims, Respondents urge that the word "acquire" in Section 459e-1(e) be read as a limitation only on formal exercises of the eminent domain power. But it is implausible to assume that Congress intended to enact a regime in which private landowners (many of whose charitable contributions of land had made the creation of the National Seashore possible) would enjoy extraordinary, categorical protection against *formal* eminent domain proceedings, but would be relegated to post-destruction damages for other governmental actions that would take their property without consent. If Congress had intended to enact such an odd regime, the term "acquire" (see Opp. 18-19), would have been a most inapt means for distinguishing between "de facto" and other takings. By engaging in actions inconsistent with a private owner's rights, the government may "inversely" condemn, and thereby "acquire," the property.[7] Indeed, this Court has long used the term just that way: "When the property was flooded the United States acquired the land and it became part of the river." *United States v. Dickinson,* 331 U.S. 745, 751 (1947).

Conclusion

The petition for certiorari should be granted.

Respectfully submitted.

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478 U.S. 597, 605 (1986).

[7] In inverse condemnation litigation, the United States commonly secures a formal transfer of title. See, *e.g.*, *Drakes Bay Land Co. v. United States*, 459 F.2d 504 (Ct.Cl. 1972) (inverse condemnation judgment entered on condition that land owner tender a deed to the government); Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144, 147 (1996) ("In condemnation cases, the government always wins a judgment giving it title (or at least possession), and in inverse condemnation cases, the government already has possession of the property – and needn't give it back").

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